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UNCLEAR REPUGNANCY: ANTITRUST IMMUNITY IN SECURITIES MARKETS AFTER *CREDIT SUISSE SECURITIES (USA) LLC V. BILLING*

JUSTIN LACOUR†

INTRODUCTION

For over a century, American antitrust laws have sought to promote competitive conduct in the market place and to protect consumers from price discrimination, price fixing, and other ill effects of monopolistic behavior.¹ The application of antitrust laws to industries subject to federal regulation presents a difficult issue, since an activity otherwise prohibited by the antitrust laws may be permitted or even required when Congress has spoken by passing a regulatory statute.² A court must determine whether a regulatory statute—either expressly or by implication—repeals the antitrust laws, and whether jurisdiction over the particular conduct lies with the regulatory agency,

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¹ Burton D. Garland, Jr. & Reuven R. Levary, *The Role of American Antitrust Laws in Today's Competitive Global Marketplace*, 6 U. MIAMI BUS. L.J. 43, 43 (1997) (stating that the twin goals of American antitrust law are "the promotion of competitive conduct and consumer welfare"); see also *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) ("[T]he Sherman Act . . . [is] the Magna Carta of free enterprise."); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972) ("Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. . . . This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation.").

² 1 JULIAN O. VON KALINOWSKI ET AL., *ANTITRUST LAWS AND TRADE REGULATION* § 60.01 (2d ed. 2007) (quoting *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 299 (1973)); see also HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* § 19.3b (3d ed. 2005) (stating that traditionally, regulated markets have been viewed as a "closed box," where antitrust enforcement is "generally unwelcome or at least seriously confined").

rather than the court.³ When Congress has remained silent, a court may determine that implied immunity exists if maintaining an antitrust action would "thwart the regulatory scheme created by Congress."⁴ Although both securities regulation and antitrust laws seek to promote efficient markets,⁵ the SEC, in regulating securities markets, must consider additional issues, such as "the economic health of the investors, the exchanges, and the securities industry," unlike antitrust law, which is concerned solely with competition.⁶ The parallel application of antitrust laws and securities regulation could therefore potentially interfere with regulatory controls and "could undercut the very objectives the antitrust laws are designed to serve."⁷ The Securities Act, the Securities Exchange Act, and the Investment Company Act,⁸ like most regulatory statutes, are silent on the

³ See KALINOWSKI ET AL., *supra* note 2, § 60.02.

⁴ *Id.* The doctrine of implied immunity or "implied repeal" is derived from two Supreme Court cases, *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922). In *Abilene*, a non-antitrust case, the plaintiff had brought an action to recover damages caused by a common carrier's collection of an allegedly unreasonable rate. The defendant argued that it was exempt from liability, because the rate it charged had been approved by the Interstate Commerce Commission ("ICC"). KALINOWSKI ET AL., *supra* note 2, § 60.02 & nn.1-3. The Supreme Court held that it would conflict with the regulatory scheme granted to the ICC to permit a state court to hear the plaintiff's claim, and the plaintiff was required to seek redress through the ICC. See *Abilene*, 204 U.S. at 440-41, 448. *Keogh* "was the first case in which the Supreme Court dismissed an antitrust claim because the industry was regulated." In *Keogh*, the plaintiff, a shipper, brought an antitrust action alleging a price-fixing conspiracy by an association. The association's defense was that the rates had been approved by the Interstate Commerce Commission. Since the Interstate Commerce Act did not expressly provide for antitrust immunity for rates approved by the ICC, the Court found immunity by implication. KALINOWSKI ET AL., *supra* note 2, § 60.02 n.3.

⁵ See *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990).

⁶ *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 689 (1975); see also Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003) [hereinafter Hovenkamp, *Antitrust Violations*] ("For the SEC these various goals may sometimes be in conflict and must be balanced against each other. By contrast, antitrust is myopic . . .").

⁷ *Town of Concord*, 915 F.2d at 22.

⁸ 15 U.S.C. §§ 77p(a), 78bb(a), 80a-49 (2000).

issue of antitrust jurisdiction,⁹ leaving courts to determine whether implied immunity exists.¹⁰

While the Supreme Court has stated that the general principles applicable to antitrust immunity are “well established,”¹¹ commentators have opined that “[t]he case law of implied immunity is . . . a quagmire.”¹² Courts have differed greatly on when implied immunity is necessary.¹³ Despite this confusion, courts have developed two distinct approaches, treating implied immunity largely as a question of authority. Most courts have looked at whether the challenged conduct fell under the jurisdiction of the regulatory agency.¹⁴ If the challenged practice fell under the agency’s jurisdiction, and the agency has exercised its authority over the practice, then a finding of implied immunity may be appropriate. Courts have differed, though, as to the extent to which the agency must exercise its authority over the practice in question before finding implied immunity.¹⁵ A second approach is to base a finding of

⁹ See, e.g., *Gordon*, 422 U.S. at 687 (noting that the Exchange Act “did not confer a general antitrust immunity”). Other regulatory statutes, however, such as the Telecommunications Act of 1996, contain a savings clause stating that nothing in the statute affects the applicability of antitrust laws. See 47 U.S.C. § 152 n.(b)(1) (2000).

¹⁰ See HOVENKAMP, *supra* note 2, § 19.3a.

¹¹ *Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 388 (1981).

¹² John Kern, Comment, *Price Manipulation in the Commodity Futures Market: A Reexamination of the Justifications for Simultaneous Causes of Action Under the CEA and the Sherman Act*, 34 UCLA L. REV. 1305, 1318 (1987) (quoting Jerome Shuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1, 27 (1976)); see also *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 727 (9th Cir. 1981) (“[W]e must recognize there is no simplistic and mechanically universal doctrine of implied antitrust immunity.”); 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 243c (3d ed. 2006) (“The implied immunity cases resist definitive harmonization.”).

¹³ See James M. Falvey & Andrew N. Kleit, *Commodity Exchanges and Antitrust*, 4 BERKELEY BUS. L.J. 123, 155 (2007) (“To say that the implied repeal . . . cases lack adequate guidelines and/or a satisfactory standard to follow in future cases is an understatement.”).

¹⁴ *Gordon*, 422 U.S. at 685 (finding implied immunity when the challenged conduct fell under the SEC’s jurisdiction); cf. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963) (finding that implied immunity was not applicable when conduct did not fall under SEC’s jurisdiction), *superseded by statute*, 15 U.S.C.A. §§ 78c(f), 78w(a)(2) (West 2006).

¹⁵ See *United States v. Nat’l Ass’n of Sec. Dealers*, 422 U.S. 694, 729–30 (1975) (finding implied immunity though SEC had not exercised its authority over the conduct in question); see also *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134, 149 (2d Cir. 2003); cf. *Gordon*, 422

implied immunity solely on the presence of a pervasive regulatory scheme. Courts have found implied immunity appropriate when the agency controls every aspect of the industry's conduct,¹⁶ or when "Congress must be assumed to have foresworn the paradigm of competition" in creating the regulatory scheme.¹⁷ Implied immunity, however, has rarely been established solely on the presence of pervasive regulation.¹⁸

Steady throughout these differing approaches to implied immunity in the case law is the long-held standard that, for implied immunity to apply, there must be "a convincing showing of clear repugnancy between the anti-trust laws and the regulatory system."¹⁹ Most courts have held that a repugnancy exists when the application of both antitrust laws and the regulatory scheme would produce conflicting standards for the regulated industry.²⁰ *Gordon v. New York Stock Exchange, Inc.*²¹

U.S. at 685, 689-90 (finding implied immunity based on active role of the SEC); *Silver*, 373 U.S. at 357-58 (refusing to find immunity when there is nothing in the regulatory scheme to perform the antitrust function); *Am. Agric. Movement, Inc. v. Bd. of Trade*, 977 F.2d 1147, 1167 (7th Cir. 1992) (holding that implied immunity is only appropriate when agency "approval of the challenged practice is active, intrusive and appropriately deliberative"); *Sound, Inc. v. Am. Tel. & Tel. Co.*, 631 F.2d 1324, 1330 (8th Cir. 1980) (finding no implied immunity when the FCC did not exercise its authority). *Gordon* has been criticized for failing to establish whether immunity may be implied when an agency does not exercise its authority over the activity. See AREEDA & HOVENKAMP, *supra* note 12, ¶ 243d; Kern, *supra* note 12, at 1320.

¹⁶ See *Am. Agric. Movement*, 977 F.2d at 1158.

¹⁷ *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1102 (7th Cir. 1983) (quoting *Ne. Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 82 (2d Cir. 1981)); see also *NASD*, 422 U.S. at 732-33 ("[T]he investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities approved by the SEC."); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-75 (1973); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 389 (1973); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 352 (1963) (holding that federal regulation of banking was not so comprehensive as to preclude antitrust laws).

¹⁸ C. DOUGLAS FLOYD & E. THOMAS SULLIVAN, PRIVATE ANTITRUST ACTIONS § 3.4.4.2 (1996); see also *MCI*, 708 F.2d at 1103 (holding that implied immunity is not established by the mere pervasiveness of a regulatory scheme); *Ne. Tel. Co.*, 651 F.2d at 82-83; HOVENKAMP, *supra* note 2, § 19.3b ("[T]he pervasiveness of the general regulatory regime is relatively unimportant.").

¹⁹ *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 388 (1981) (quoting *NASD*, 422 U.S. at 719-20); accord *Gordon*, 422 U.S. at 682; *Phila. Nat'l Bank*, 374 U.S. at 350-51; *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 726 (9th Cir. 1981); *Sound*, 631 F.2d at 1327; *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 462 F. Supp. 1072, 1083 (N.D. Ill. 1978) (referring to "repugnancy" as a "threshold requirement" for a finding of implied immunity).

²⁰ *Strobl v. N.Y. Mercantile Exch.*, 768 F.2d 22, 27 (2d Cir. 1985) ("[A]ntitrust

provides a clear example of this traditional implied immunity analysis. In *Gordon*, the SEC had approved a system of fixed commission rates, a practice that would be a per se violation of antitrust laws. Since the practice fell under the SEC's authority and there was a direct conflict between the two laws, the Supreme Court found implied immunity.²² Other courts have also viewed repugnancy, not in terms of a conflict between two laws, but as a conflict of authority: Application of antitrust laws would conflict with the authority Congress has granted to regulatory agencies.²³

Still, courts have applied even this seemingly simple rule in different ways. Courts have differed as to the effect agency approval or disapproval of the activity has on the question of implied immunity. Some courts have been willing to find implied immunity even when the challenged conduct has been disapproved of by both antitrust laws and the regulatory agency.²⁴ Many courts, however, have chosen to treat agency disapproval of the challenged practice as refuting any claim of implied immunity since, in such cases, there would be no conflict between antitrust laws and the regulatory scheme.²⁵ In short, the "clear repugnancy" standard appears as muddled as the other areas of implied immunity case law.

Two recent Supreme Court cases have addressed the issue of implied antitrust immunity for regulated industries. Instead of

laws may not apply when such laws would prohibit an action that a regulatory scheme might allow."); see also *Finnegan v. Campeau Corp.*, 915 F.2d 824, 829 (2d Cir. 1990) (holding that implied immunity "may only be found where there is a conflict between the provisions of the antitrust and securities laws").

²¹ 422 U.S. 659 (1975).

²² *Id.* at 689.

²³ See, e.g., *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134, 149 (2d Cir. 2003) ("[I]mplied repeal does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme . . ."); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 800-01 (2d Cir. 2002) (holding that implied immunity exists when antitrust laws would "conflict with Congress's implicit determination that the SEC should regulate the alleged anti-competitive conduct"); see also Jeffrey R. Babbitt et al., *Developments in the Second Circuit: 2002-2003*, 36 CONN. L. REV. 1187, 1234-35 (2004) (arguing that *Stock Exchanges Options* equates "repugnancy" with the *Silver* "necessity" standard).

²⁴ See *Stock Exchs. Options*, 317 F.3d at 149.

²⁵ See *Strobl*, 768 F.2d at 28; *MCI Commc'ns. Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1105 (7th Cir. 1983); *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 732 (9th Cir. 1981).

providing a much-needed definite standard, however, these cases, by shifting the Court's focus to a more outcome-determinative analysis, have only produced additional questions. In *Verizon Communications, Inc. v. Law Office of Curtis V. Trinko, LLP*,²⁶ the Court suggested that implied immunity for violations of the Sherman Act may be appropriate when there is a real possibility that antitrust courts will produce judgments that conflict with the FCC's regulatory scheme.²⁷ The Court, upon finding that implied immunity was not appropriate, proceeded to apply a "costs-benefits" analysis, maintaining that, where a strong regulatory agency is in place, the benefits of additional antitrust enforcement are slight and, thus, unnecessary.²⁸ *Trinko* is significant; unlike previous immunity analysis, which was largely concerned with whether authority over the challenged conduct fell to the agency or antitrust laws, *Trinko* is largely concerned with outcome (i.e., the potential effects of withholding antitrust immunity).²⁹

Three years later, in *Credit Suisse Securities (USA) LLC v. Billing*,³⁰ the Court considered the issue of whether there was a clear repugnancy between antitrust and securities laws.³¹ Although both the regulatory scheme and antitrust laws prohibited the activity in question, the Court still found a conflict between securities and antitrust laws. In determining whether the Sherman Act and the Clayton Act were "irreconcilable" with the Securities Act and the Exchange Act, the Court did not adopt the same analysis as prior implied immunity cases, by examining whether the two sets of laws were in conflict. Rather, the Court looked chiefly at the potential difficulties for judges and juries in resolving such issues, as opposed to the SEC,³² and applied a cost-benefit analysis for antitrust enforcement (echoing *Trinko*).³³ The Court pointed to the danger of conflicting standards—both a

²⁶ 540 U.S. 398 (2004).

²⁷ *Id.* at 406; see also Falvey & Kleit, *supra* note 13 (arguing that *Trinko* "reinforces the *Strobl* antitrust laws and regulatory scheme 'conflict' standard of reviewing").

²⁸ *Trinko*, 540 U.S. at 412–13.

²⁹ AREEDA & HOVENKAMP, *supra* note 12, at ¶ 243g.

³⁰ 127 S. Ct. 2383 (2007).

³¹ *Id.* at 2393 ("[T]he question before us concerns . . . [whether] there [is] a conflict that rises to the level of incompatibility.").

³² *Id.* at 2394–96.

³³ *Id.* at 2396.

conflict between courts and the SEC as well as the possibility of different courts providing a variety of different standards for the industry.³⁴ In light of this new approach to implied immunity analysis, the standard for determining when a repugnancy exists is still anything but clear.

This Note argues that a “clear repugnancy” does not exist when both the SEC and antitrust laws prohibit the activity in question. In reaching its finding of implied immunity, *Billing* departed from the principles of traditional immunity analysis to create a new, outcome-determinative test for repugnancy. This approach—that a repugnancy exists when there is the potential for conflicting outcomes from lower courts—is an unprecedented broadening of the implied immunity doctrine. Part I of this Note examines courts’ divergent approaches to the “clear repugnancy” standard in implied immunity cases concerning the securities industry prior to *Billing*. Part II of this Note analyzes *Billing* and the Court’s approach to the “clear repugnancy” standard. Part III of this Note proposes that SEC approval of the challenged conduct is essential to a finding of “clear repugnancy” and that, for a conflict to exist, the two laws must produce “differing results.”

I. HISTORY OF IMPLIED IMMUNITY IN THE SECURITIES INDUSTRY

A. *The Supreme Court Cases: Silver-Gordon-NASD*

Three Supreme Court cases established certain basic factors for a finding of implied immunity in the securities markets. First, there must be a clear repugnancy between securities laws and antitrust laws. A repugnancy is present when the SEC has been granted authority over the activity and exercised that authority, and when the application of both laws would result in conflicting standards for the industry.³⁵

The Supreme Court first addressed the issue of implied antitrust immunity in the securities industry in *Silver v. New York Stock Exchange*.³⁶ In *Silver*, a securities firm that was not a member of the New York Stock Exchange arranged to have direct

³⁴ *Id.* at 2395.

³⁵ *See id.* at 2392 (discussing the factors required for antitrust immunity as derived from *Gordon* and *NASD*).

³⁶ 373 U.S. 341 (1963), *superseded by statute*, 15 U.S.C.A. §§ 78c(f), 78w(a)(2) (West 2006).

telephone wire connections to Exchange members, in order to have greater access to market data.³⁷ The Exchange originally approved of the connections but later rescinded its decision and cut off the connections to Exchange members.³⁸ Silver brought an action against the Exchange for violations of the Sherman Act, arguing that the Exchange had engaged in anticompetitive behavior resulting in substantial losses for Silver's firm.³⁹ Since the removal of the wires by the Exchange would have constituted a per se violation of antitrust laws, the Court had to determine whether the Exchange Act had "created a duty of exchange self-regulation so pervasive as to" preclude the application of antitrust laws, thus exempting the Exchange from liability in this case.⁴⁰ The Court first noted that the Exchange Act provided no express exemption from antitrust laws, and that immunity by implication is "not favored" but may be found if immunity is "necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary."⁴¹

Once the Court noted that courts should reconcile antitrust laws and regulatory schemes whenever possible,⁴² the key issue for the Court was whether Silver's antitrust suit was "incompatible" with the SEC's regulation of the Exchange.⁴³ Since the Court found that the Exchange Act was not sufficiently pervasive to create a total exemption from the Sherman Act and the Clayton Act for the industry⁴⁴ and that the SEC did not have authority under the Exchange Act to regulate the challenged activity, there was no possibility of a conflict and, thus, implied immunity was not appropriate.⁴⁵ *Silver* provided two factors in

³⁷ *Id.* at 343.

³⁸ *Id.* at 344.

³⁹ *Id.* at 344-45.

⁴⁰ *Id.* at 347.

⁴¹ *Id.* at 357; *see also* *Thill Sec. Corp. v. N.Y. Stock Exch.*, 433 F.2d 264, 269 (7th Cir. 1970) (holding that implied immunity must be based on a showing of true necessity). This is referred to as the *Silver* "'necessity' formula. *See* AREEDA & HOVENKAMP, *supra* note 12, ¶ 243d.

⁴² *See Silver*, 373 U.S. at 357; *see also* *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (holding that when two laws touch upon the same subject, the rule is to give effect to both laws if possible).

⁴³ *Silver*, 373 U.S. at 358; *see also* *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 301 (1973) (discussing the *Silver* court's analysis of incompatibility between regulatory statutes and antitrust laws).

⁴⁴ *See Silver*, 373 U.S. at 360-61.

⁴⁵ *See id.* at 357-58; *see also* *Falvey & Kleit*, *supra* note 13, at 150 ("Although there was a comprehensive regulatory framework in place, there was no direct

determining antitrust immunity: First, as a threshold issue, there had to be a clear repugnancy (or “incompatibility” in the language of *Silver*) between the regulatory scheme and antitrust laws; and, second, immunity for the challenged conduct is granted only to the minimum necessary to make the regulatory scheme work (the *Silver* “necessity rule”).⁴⁶

Twelve years later, the Court in *Gordon v. New York Stock Exchange, Inc.*⁴⁷ reexamined antitrust immunity in the securities industry. The plaintiff alleged that the Exchange’s fixed commission rates for stockbrokers, along with other practices, violated the Sherman Act.⁴⁸ The Court employed a standard similar to the “incompatibility” test used in *Silver* and stated that an implied repeal could only be found where there is a “‘plain repugnancy between the antitrust and regulatory provisions.’”⁴⁹ Unlike the *Silver* Court, however, the *Gordon* Court found a conflict between antitrust laws and the regulatory scheme and granted implied immunity.⁵⁰ The Court based its decision on the fact that the Exchange Act gave the SEC direct regulatory power over the challenged activity and that the SEC had taken an active role in regulating the activity.⁵¹ Furthermore, to deny antitrust immunity would subject the exchanges and their members to “conflicting standards.”⁵²

securities regulation addressing the telephone issue found in *Silver*. Accordingly, the Court denied the defense of Implied Immunity.”)

⁴⁶ Philip F. Johnson, *Antitrust in the Commodities Field: After Gordon*, 6 HOFSTRA L. REV. 115, 117 (1977).

⁴⁷ 422 U.S. 659 (1975).

⁴⁸ See *id.* at 661. Gordon alleged that Exchange members had conspired to fix commission rates for small investors at unreasonably high levels, in light of the actual cost of executing a trade, and that this practice unlawfully discriminated against small investors. See *Gordon v. N.Y. Stock Exch., Inc.*, 366 F. Supp. 1261, 1262 (S.D.N.Y. 1973), *aff’d*, 498 F.2d 1303 (2d Cir. 1974), *aff’d*, 422 U.S. 659 (1975).

⁴⁹ *Gordon*, 422 U.S. at 682 (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 350–51 (1963)).

⁵⁰ See *id.* at 684–85.

⁵¹ See *id.* at 685; *Harding v. Am. Stock Exch., Inc.*, 527 F.2d 1366, 1368 (5th Cir. 1976) (“[R]ather than presenting a case of SEC impotence . . . this case involves explicit statutory authorization for SEC review of all exchange rules and practices dealing with rates of commission and resultant SEC continuing activity.”); *Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237 (2d Cir. 1975) (reading *Gordon* as posing a two-part test: whether the activity fell under the SEC’s jurisdiction, and whether the SEC had actively asserted its authority); see also *Credit Suisse Sec. (USA) L.L.C. v. Billing*, 127 S. Ct. 2383, 2390 (2007) (discussing the *Gordon* court’s rationale for finding a conflict between the two laws).

⁵² *Gordon*, 422 U.S. at 689; see FLOYD & SULLIVAN, *supra* note 18, § 3.4.4.3

Gordon focused not on the pervasiveness⁵³ of the regulatory scheme but, rather, on the congressional intent to give authority over the activity to the SEC and the SEC's exercise of its authority.⁵⁴ In finding that the SEC had "actively regulated" the practice, the Court pointed to the SEC's fifteen-year process of studying the effects of fixed commission rates, holding hearings, proposing rules, setting breakpoints for commission rates, approving increases in those breakpoints, and eventually prohibiting fixed commission rates, while still retaining the power to reinstate fixed rates if necessary.⁵⁵ The Court reasoned that this long history of regulation, coupled with the authority conferred by the Exchange Act and subsequent congressional approval of SEC rules, showed that Congress intended to confer on the SEC the power to regulate commission rates.⁵⁶ It concluded that antitrust immunity was therefore necessary to protect the SEC's power.⁵⁷ Here, the Court tinkered with the *Silver* necessity standard, by asking not whether the particular SEC rule was necessary to make the Exchange Act work⁵⁸ but,

(discussing that, in *Gordon*, the Exchange Act clearly contemplated that the SEC would approve some commission rates, while antitrust laws would condemn any fixed rates; therefore, the two laws were incompatible); see also *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 729 (9th Cir. 1981).

⁵³ See *Gordon*, 422 U.S. at 688-89; see also *Jacobi*, 520 F.2d at 1238 (holding that, although the Exchange Act is not sufficiently pervasive to grant blanket antitrust immunity, "particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim"); cf. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-75 (1973) (holding that antitrust immunity is appropriate in the presence of a pervasive regulatory scheme).

⁵⁴ See, e.g., *Kern*, *supra* note 12, at 1320. *Gordon*, however, "spawned additional ambiguities" by failing to articulate the consequences of the SEC's failure to exercise its authority. *Id.*

⁵⁵ See *Gordon*, 422 U.S. at 670-83.

⁵⁶ See *id.* at 691. The fact that section 19(b), which permitted the SEC to fix commission rates, was passed seven years after the Supreme Court held the practice to be a per se violation of antitrust indicated to the *Gordon* Court the congressional intent to impliedly repeal antitrust laws in this context. See Robert Simon Balter & Christian C. Day, *Implied Antitrust Repeals: Principles for Analysis*, 86 DICK. L. REV. 447, 463 (1982).

⁵⁷ See *Gordon*, 422 U.S. at 691.

⁵⁸ See *id.* at 688. The *Gordon* court distinguished its ruling from *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264 (1970), and declined to follow *Thill's* holding that concerned whether the particular rule itself was necessary to make the Exchange Act work. See *Gordon*, 422 U.S. at 686-87.

rather, whether antitrust enforcement would conflict with the overall regulatory scheme.⁵⁹

In the same year as *Gordon*, the Supreme Court decided *United States v. National Ass'n of Securities Dealers, Inc.* ("NASD").⁶⁰ In *NASD*, the government alleged that the NASD, mutual funds, and broker-dealers had conspired to restrict the sale and fix the resale price of mutual fund shares, thereby inhibiting the growth of a secondary market in mutual fund securities,⁶¹ and forcing investors to pay "artificial and non-competitive" sales loads for mutual fund shares.⁶² Employing many of the same factors as *Gordon*,⁶³ the Court found a clear repugnancy between antitrust laws and the regulatory statute and granted antitrust immunity.⁶⁴ *NASD*, however, differs from *Gordon* because while the SEC had been given authority to regulate such activities, the SEC had arguably never exercised that authority, such as by promulgating standards that permitted the challenged conduct.⁶⁵ The Investment Company Act of 1940 permitted mutual fund companies to impose restrictions on the sales of their shares, as long as these limitations conformed to the rules promulgated by the SEC.⁶⁶

⁵⁹ See *Gordon*, 422 U.S. at 688 ("[W]e are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress."); see, e.g., AREEDA & HOVENKAMP, *supra* note 12, ¶ 243d. Under *Gordon*, "necessity" may have two meanings: (1) whether antitrust immunity is necessary to make the statute function as a "general matter;" or (2) whether the specific activity was "necessary to achieve regulatory goals." The second inquiry is not needed if the first question is satisfied. *Id.*

⁶⁰ 422 U.S. 694 (1975).

⁶¹ Mutual fund shares are purchased by investors from the fund itself or through a broker for the fund, which is considered a primary market. Investors do not purchase shares from other investors on a secondary market, such as the New York Stock Exchange. U.S. Securities and Exchange Commission, Mutual Funds, <http://www.sec.gov/answers/mutfund.htm>; see *NASD*, 422 U.S. at 699–700. An active secondary market in mutual fund shares existed prior to 1940, and abuses in the secondary market led to the passage of the Investment Company Act, which was designed to restrict most secondary market trading. See *NASD*, 422 U.S. at 709–10.

⁶² *NASD*, 422 U.S. at 700; Haddad v. Crosby Corp. (*In re Mut. Fund Sales Antitrust Litig.*), 374 F. Supp. 95, 97 (D.D.C. 1973), *aff'd sub nom.* United States v. NASD, 422 U.S. 694 (1975), *aff'd in part and rev'd in part sub nom.* Haddad v. Crosby Corp., 533 F.2d 1247 (D.C. Cir. 1976), and *aff'd without opinion*, 578 F.2d 442 (D.C. Cir. 1978).

⁶³ See *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2391 (2007).

⁶⁴ See *NASD*, 422 U.S. at 719.

⁶⁵ See *id.* at 727; AREEDA & HOVENKAMP, *supra* note 12, at ¶ 243d.

⁶⁶ See *NASD*, 422 U.S. at 722.

The SEC, however, had not set any standards.⁶⁷ At first glance, it would seem that the SEC had not exercised its authority. The Court, however, looked at the role of the SEC prescribed by the Act: Mutual funds retained the initiative in adopting sales restrictions in order to combat disruptive trading practices, subject to oversight by the SEC.⁶⁸ The Court held that the SEC's decision not to impose restrictions was an appropriate exercise of its authority, considering its role under the Act of providing administrative oversight.⁶⁹

The Court framed the issue of repugnancy as a conflict between antitrust laws and the *authority* of the SEC.⁷⁰ In other words, since Congress had charged the SEC with final oversight authority over mutual fund companies, to permit an antitrust suit would conflict with the authority granted to the SEC to approve or disapprove of the companies' practices.⁷¹ The Court also pointed to the "pervasive supervisory authority" of the SEC,⁷² and the danger of "inconsistent standards" in the absence of antitrust immunity.⁷³ While *Gordon* was silent as to the extent to which the SEC must exercise its authority, *NASD* indicated that this issue largely depends on the role conferred by Congress on the SEC concerning a particular activity. The *NASD* Court reasoned that Congress had determined that there should be some restrictions on competition in the mutual fund industry, and that funds could impose restrictions subject to SEC approval;⁷⁴ it was Congress' clear intent that the SEC have the

⁶⁷ *Id.* at 721. Although the SEC had not prescribed any rules, SEC reports had repeatedly acknowledged "the significant role that private agreements have played in restricting the growth of a secondary market in mutual-fund shares," and the SEC had permitted fund-initiated restrictions for over three decades. The Court noted that the SEC's election not to prescribe its own rules was not an "abdication of its regulatory responsibilities," but rather a manifestation of "informed administrative judgment." *Id.* at 727-28.

⁶⁸ *Id.* at 727.

⁶⁹ *Id.* at 728.

⁷⁰ *See id.* at 729-30.

⁷¹ *See id.*; *see also* FLOYD & SULLIVAN, *supra* note 18, at 338-39 (stating that *NASD* stands for the proposition that, for implied immunity to apply, the SEC does not have to approve of the conduct, but it should not exercise its authority to disapprove it either).

⁷² *NASD*, 422 U.S. at 733; *see* Austin Mun. Secs., Inc. v. Nat'l Ass'n of Secs. Dealers, Inc., 757 F.2d 676, 695-96 (5th Cir. 1985).

⁷³ *See NASD*, 422 U.S. at 735.

⁷⁴ *See id.* at 726; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1237 (1996) ("*NASD* suggested that the mere fact that the statute permits private parties to enter anticompetitive agreements is alone

authority to determine to what extent these restrictions should be tolerated in order to protect the interests of investors.⁷⁵ A repugnancy existed because of the “pervasive supervisory authority”⁷⁶ granted to the SEC, rather than any affirmative act or policy by the SEC.

B. *Interim Lower Court Decisions*

The lower court decisions prior to *Billing* provide additional clarity to the line of reasoning established by *Silver*, *Gordon*, and *NASD*. First, when a regulatory agency has disapproved of an activity that is also prohibited by antitrust laws, a repugnancy does not exist, and implied immunity should not be found. When Congress has granted the SEC some level of autonomy over an activity, however, a repugnancy may exist, even if the SEC has not exercised its authority to approve or disapprove of the activity. In such cases, a repugnancy may exist, even if the agency currently disapproves of the activity, as long as the agency could potentially approve of the activity.

The lower court cases immediately following *Gordon* and *NASD* tended to cover the same ground as *Gordon*: Implied immunity is appropriate when the activity falls under the SEC’s authority, the SEC has actively regulated that activity, and immunity is necessary to make the regulatory statute function as intended.⁷⁷ In *Austin Municipal Securities, Inc. v. National Ass’n of Securities Dealers*,⁷⁸ and *Harding v. American Stock*

sufficient to establish ‘clear repugnancy’ with the antitrust laws.”).

⁷⁵ See *NASD*, 422 U.S. at 729; see also 15 U.S.C.A. § 80a-22(f) (West 2008).

⁷⁶ The Court determined that the SEC held “pervasive supervisory authority” over the mutual funds since the SEC had the power to determine if a company had satisfied the requirement of the Investment Company Act of 1940. Furthermore, all registered companies were required to submit any proposed rule changes to the SEC for approval, and the SEC had the power to request changes, or order such changes itself. See *NASD*, 422 U.S. at 732.

⁷⁷ See, e.g., *Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237 (2d Cir. 1975) (finding no implied immunity when the SEC’s power to enforce a rule on stock sales revenues was at “the periphery of its jurisdiction” and the SEC had disclaimed any power to review).

⁷⁸ 757 F.2d 676 (5th Cir. 1985) (holding that the pervasive regulatory scheme of the Maloney Act and the Exchange Acts shielded disciplinary officers of the NASD from an antitrust action).

Exchange,⁷⁹ the Fifth Circuit examined cases factually similar to *NASD* and found implied immunity.⁸⁰

The next group of significant implied immunity cases was decided by the Second Circuit. Although involving commodities markets, rather than the securities markets, *Strobl v. New York Mercantile Exchange*⁸¹ is an important implied immunity case⁸² and elucidates the clear repugnancy standard. Unlike prior case law, *Strobl* involved conduct that was both a per se violation of antitrust laws and prohibited by the regulatory statute.⁸³ The plaintiff, a speculator in potato futures, alleged that potato processors had conspired to manipulate the futures prices, resulting in a loss to the plaintiff.⁸⁴ Since price manipulation was specifically forbidden by the Commodity Exchange Act ("CEA"), as well as by the Sherman Act and the Clayton Act, the provisions of the CEA did not conflict with antitrust laws.⁸⁵ The *Strobl* court maintained that the presence of a regulatory scheme alone is insufficient to grant immunity; rather, there must be an actual conflict (not simply an overlap of authority).⁸⁶ *Gordon and Silver* "teach that antitrust laws may not apply when such laws would prohibit an action that a regulatory scheme might allow."⁸⁷ In *Strobl*, price manipulation was expressly prohibited under section 6(b) of the CEA; this was not a case, such as *NASD*, where Congress had granted the agency some degree of autonomy over the practice and the agency could permit or prohibit manipulation at its discretion. *Strobl* indicates that, unless an agency has been granted pervasive supervisory power over an activity, agency approval of the challenged conduct is necessary for a finding of implied immunity, since, otherwise, no clear repugnancy would exist.

The Second Circuit adopted a line of reasoning more in tune with *NASD*⁸⁸ in *Finnegan v. Campeau Corp.*,⁸⁹ focusing its

⁷⁹ 527 F.2d 1366 (5th Cir. 1976) (holding that the delisting of an investor's stock by an exchange was "without the ambit" of antitrust laws since delisting was subject to approval by SEC).

⁸⁰ See *Austin*, 757 F.2d at 695; *Harding*, 527 F.2d at 1369-70.

⁸¹ 768 F.2d 22 (2d Cir. 1985).

⁸² See *Falvey & Kleit*, *supra* note 13, at 152.

⁸³ See *Strobl*, 768 F.2d at 28; *Falvey & Kleit*, *supra* note 13, at 152.

⁸⁴ *Strobl*, 768 F.2d at 24.

⁸⁵ *Id.* at 27-28.

⁸⁶ *Id.* at 27.

⁸⁷ *Id.*

⁸⁸ *AREEDA & HOVENKAMP*, *supra* note 12, ¶ 243e3 (noting that *Finnegan* follows

inquiry on the question of the SEC's authority. In *Finnegan*, the shareholder of a target company brought an antitrust action, alleging that the conspiratorial practices of two bidders in a takeover attempt violated the Sherman Act.⁹⁰ The court held that, since the Williams Act gave the SEC authority to require disclosure of bidding arrangements and prevent fraudulent practices, the Act and antitrust laws were in conflict.⁹¹ The fact that the SEC had not exercised that authority did not "reduce the SEC's supervisory authority."⁹² Since the SEC's authority in this instance primarily consisted of ordering disclosures, however, it arguably would not necessarily conflict with the SEC's authority to apply both the Williams Act and the Sherman Act.⁹³

The Second Circuit continued this interpretation of repugnancy in *Friedman v. Salomon/Smith Barney, Inc.*,⁹⁴ finding antitrust immunity based on a conflict of authority, even when the SEC had studied the activity in question and failed to exercise its authority to disapprove of the activity.⁹⁵ In *Friedman*, individual investors alleged that defendants, sellers of stock, restricted investors from "flipping" (selling their purchases shortly after an initial public offering) as a form of price stabilization (a restriction not in place for institutional investors) in violation of the Sherman Act.⁹⁶ The court found that since, under the Exchange Act, price stabilization measures were permitted subject to SEC approval, Congress had granted the SEC pervasive oversight authority over the activity.⁹⁷ Therefore, permitting antitrust litigation would conflict with the role given to the SEC by Congress to have final authority over the challenged conduct.⁹⁸

NASD).

⁸⁹ 915 F.2d 824 (2d Cir. 1990).

⁹⁰ *Id.* at 826.

⁹¹ *Id.* at 829-31.

⁹² *Id.* at 831.

⁹³ William T. Reid IV, Comment, *Implied Repeal of the Sherman Act Via the Williams Act: Finnegan v. Campeau Corp.*, 65 ST. JOHN'S L. REV. 965, 974-76 (1991) ("Since SEC intervention into conspiratorial bidding arrangements is beyond any procedural powers vested in the SEC by section 14(e), the Sherman Act can coexist with the Williams Act.").

⁹⁴ 313 F.3d 796 (2d Cir. 2002).

⁹⁵ See *id.* at 800-01; AREEDA & HOVENKAMP, *supra* note 12, ¶ 243e3.

⁹⁶ *Friedman*, 313 F.3d at 797-98.

⁹⁷ See *id.* at 802.

⁹⁸ See *id.* at 800-01.

Although not explicitly overturning *Strobl*, *In re Stock Exchanges Options Antitrust Litigation* ("Stock Options")⁹⁹ diverged significantly from *Strobl*'s previous emphasis on "conflicts."¹⁰⁰ In *Stock Options*, the purchasers of equity options alleged that several exchanges had conspired to restrict the listing and trading of particular options to one exchange at a time, rather than multiple listings, thereby restraining trade in violation of the Sherman Act.¹⁰¹ Although the SEC's view on whether multiple listings should be permitted had changed often in the past,¹⁰² at the time of *Stock Options*, both the SEC and the Sherman Act prohibited restrictions on multiple listings.¹⁰³ The plaintiff contended that implied repeal was not necessary since there was no conflict between the two laws.¹⁰⁴ Nevertheless, the court found that implied immunity does not depend on a conflict between the views of the agency and antitrust laws; rather, "it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit."¹⁰⁵ Section 9(b) of the Exchange Act made it unlawful for any person to engage in options transactions "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."¹⁰⁶ Congress had thus granted the SEC broad supervisory power to regulate options trading.¹⁰⁷ The court saw no way to reconcile the authority of the SEC—which could

⁹⁹ *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134 (2d Cir. 2003).

¹⁰⁰ See Falvey & Kleit, *supra* note 13, at 153–54.

¹⁰¹ *Stock Options*, 317 F.3d at 138.

¹⁰² *Id.* at 143.

¹⁰³ *Id.* at 142 (citing U.S. Department of Justice Amicus Curiae Brief at 12–13).

¹⁰⁴ *Id.* at 149.

¹⁰⁵ *Id.*

¹⁰⁶ 15 U.S.C. § 78i(b) (2000). Although section 9(b) is not discussed in *Stock Options*, it is analyzed in the underlying district court decision, which *Stock Options* frequently references. See *In re Stock Exchs. Options Trading Antitrust Litig.*, No. 1283, 2001 WL 128325, at *1 (S.D.N.Y. Feb. 15, 2001), *aff'd sub nom.* *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134 (2d Cir. 2003).

¹⁰⁷ See *In re Stock Options*, 2001 WL 128325, at *2. The district court decision noted that, when Congress amended the Exchange Act in 1975, the SEC's power over options trading increased. The exchanges were required to submit all rule changes to the SEC for approval, and the SEC was authorized to alter exchange rules. *Id.* This is similar to the "pervasive supervisory" authority found in *NASD*. See *supra* note 76.

potentially permit exclusivity agreements—with antitrust laws.¹⁰⁸ The court reached this decision despite an amicus brief from the SEC arguing against granting immunity,¹⁰⁹ prompting some commentators to note that *Stock Options* “does not even allow a regulatory agency to deny authority.”¹¹⁰ The opinion in *Stock Options* equated the traditional inquiry of whether there is a clear repugnancy, thus making implied immunity necessary to make the Exchange Act work, with the inquiry of whether antitrust laws conflict with an overall regulatory scheme that grants the authority to a regulatory agency to permit the challenged conduct.¹¹¹

II. CREDIT SUISSE SECURITIES (USA) LLC V. BILLING

In *Credit Suisse Securities (USA) LLC v. Billing*,¹¹² the Supreme Court again addressed the issue of antitrust immunity in the securities industry and held, in a 7-1 decision,¹¹³ in favor of implied immunity. Although *Billing* purported to be solidly based on the Court’s earlier decisions in *Silver*, *Gordon*, and *NASD*, something had clearly changed in the Court’s antitrust immunity analysis. While prior cases focused on questions of authority over the challenged conduct, the bulk of *Billing*’s analysis concerned the potential results of antitrust litigation. This new test, initially proposed by *Trinko* and affirmed by *Billing*, recasts “clear repugnancy” as a question of outcomes, rather than any inherent differences in policy or authority. In *Billing*, conflict is not premised on a difference of opinion between antitrust laws and the regulatory agency, or even a

¹⁰⁸ *In re Stock Exchs. Options*, 317 F.3d. at 150.

¹⁰⁹ See *id.* at 149. The SEC maintained that:

[T]his is an unusual case, in which the Commission has addressed the precise conduct at issue and has decided to prohibit it It does not present a situation where, in our view, the antitrust laws are impliedly repealed, such as where the securities laws authorize the conduct or the Commission has approved or permitted it.

Id. at 142 (internal quotation marks omitted) (quoting SEC Amicus Curiae Brief at 2–3).

¹¹⁰ Falvey & Kleit, *supra* note 13, at 155.

¹¹¹ Babbin et al., *supra* note 23, at 1234–35.

¹¹² 127 S. Ct. 2383 (2007).

¹¹³ Justice Thomas dissented arguing that both the Securities Act and the Exchange Act have broad saving clauses that preserved the right to seek remedies under other laws. *Id.* at 2399. Justice Kennedy recused himself since his son was a managing director of Credit Suisse Securities. See Linda Greenhouse, *Justices Back Underwriters on New Issues*, N.Y. TIMES, June 19, 2007, at C1.

conflict of authority between the two laws. Rather, the Court's finding of a conflict is largely based on the possibility of differing results from lower courts if antitrust lawsuits are permitted. At the heart of this new approach is the underlying policy of limiting securities and antitrust lawsuits that could be numerous and unmeritorious. In fashioning a new standard for antitrust immunity, *Billing* has conferred such broad-scale immunity¹¹⁴ from antitrust suits that it begs the question when, if ever, immunity would be *inappropriate* in the securities industry.

In *Billing*, a group of sixty investors filed two antitrust class action suits against ten leading investment banks.¹¹⁵ During the stock market bubble of the late 1990s, the banks had served as underwriters, forming syndicates¹¹⁶ to execute the IPOs of hundreds of technology-related companies.¹¹⁷ The investors alleged that the banks violated antitrust laws by conspiring not to sell shares of the new IPOs unless the buyers agreed: (1) to pay excessively high sales commissions; (2) to purchase other, less desirable securities in a practice known as "tying";¹¹⁸ and (3) to buy additional shares of the IPO at escalating prices in a practice known as "laddering."¹¹⁹ The investors alleged that the

¹¹⁴ Brian A. Howie, *Aimed at Antitrust*, LEGAL TIMES (Wash., D.C.), July 16, 2007, at 60.

¹¹⁵ *Billing*, 127 S. Ct. at 2388.

¹¹⁶ Two or more investment banks often form a syndicate to underwrite IPOs. The banks assess the market value and price the shares of the new IPO. The banks buy the shares from the company at an agreed price and resell the shares to investors at full price. See Wesley R. Powell & Matthew Freimuth, *Antitrust Disputes Nixed: SEC Governs IPO Underwritings*, N.Y.L.J., Aug. 23, 2007, at 4. "Such syndicate activity is a commonplace feature of IPOs and clearly allowed (even encouraged) under securities law." Stephen J. Hill, *Supreme Court Decision Precludes Overlap Between Antitrust and Securities Laws*, 15 ANDREWS ANTITRUST LITIG. REP. 3 (2007).

¹¹⁷ Powell & Freimuth, *supra* note 116, at 4; see also Howie, *supra* note 114, at 60; Roberta S. Karmel, *Underwriters' Victory in Supreme Court Case*, N.Y.L.J., Aug. 16, 2007, at 3.

¹¹⁸ *Billing*, 127 S. Ct. at 2389; Howie, *supra* note 114, at 60; Karmel, *supra* note 117, at 3. Certain tie-in arrangements require customers to purchase shares of the same security after the IPO, creating an artificial demand for the stock. This practice is manipulative since its purpose is to push the price of the stock higher following the IPO. See *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 142 (2d Cir. 2005), *rev'd sub nom. Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

¹¹⁹ *Billing*, 127 S. Ct. at 2389. Laddering agreements, a variation on "tying," are another form of price manipulation of a stock in which the pre-arranged purchase of shares at escalating prices following the IPO stimulates the demand for the stock, helping the price rise to a premium. See *Billing*, 426 F.3d at 142-43.

purpose of this conspiracy was: (1) to increase the price of shares that purchasers paid following the IPO well above what the price would have been in a competitive market; and (2) to create an artificial demand for the shares, leading to increased commissions and fees for the banks.¹²⁰

The banks moved to dismiss the claim, arguing that federal securities laws impliedly repealed antitrust laws for the challenged conduct.¹²¹ The district court found immunity and dismissed the complaint,¹²² while the Second Circuit reversed and reinstated the complaint.¹²³

In addressing the issue of implied immunity, the Supreme Court drew heavily on the *Silver-Gordon-NASD* line of cases,¹²⁴ reiterating the old standards that courts may imply a repeal of antitrust laws “only to the minimum extent necessary” and only if a “plain repugnancy” exists between the antitrust laws and regulatory provisions.¹²⁵ From the *Silver-Gordon-NASD* triumvirate, the Court distilled four critical factors for finding a “clear repugnancy” between antitrust and securities laws:

(1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; . . . (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct[; and] . . . (4) . . . [whether] the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.¹²⁶

The Court easily dispatched three of these requirements.¹²⁷ First, the Court found that the activity in question—investment

¹²⁰ *In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 500 (S.D.N.Y. 2003), *vacated sub nom.* *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005), *rev'd sub nom.* *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

¹²¹ *Billing*, 127 S. Ct. at 2389.

¹²² *See IPO Antitrust Litig.*, 287 F. Supp. 2d at 524–25.

¹²³ *See Billing*, 426 F.3d at 170.

¹²⁴ *See Billing*, 127 S. Ct. at 2389–92; Karmel, *supra* note 117, at 3, 7; Powell & Freimuth, *supra* note 116, at 4, 7 (stating that the *Billing* Court “anchored” its opinion on *Silver-Gordon-NASD*).

¹²⁵ *See Billing*, 127 S. Ct. at 2390.

¹²⁶ *Id.* at 2392.

¹²⁷ *See Powell & Freimuth*, *supra* note 116, at 7 (“In short order, the Court found three of these factors present in *Billing*.”).

banks acting jointly to underwrite new securities—is “central to the proper functioning of well-regulated capital markets.”¹²⁸ The Court also found that the SEC had broad authority to regulate the banks’ conduct¹²⁹ and had continuously exercised that authority.¹³⁰

The *Billing* Court devoted most of its analysis to the third issue: whether the concurrent application of both securities and antitrust laws would produce conflicting standards for the banks.¹³¹ The SEC had long considered tying and laddering arrangements to be “fraudulent and manipulative.” Such practices had always been actionable under section 17(a) of the Securities Act and section 10(b) and rule 10b-5 of the Exchange Act,¹³² and the SEC had brought actions against underwriters

¹²⁸ In analyzing the fourth factor, the Court looked beyond whether the activity was regulated by the SEC to the importance of the activity to the securities markets. The Court noted that the IPO process is valuable to the market since it “supports new firms that seek to raise capital; it helps to spread ownership of those firms broadly among investors; it directs capital flows in ways that better correspond to the public’s demand for goods and services.” See *Billing*, 127 S. Ct. at 2392; see also Brief of Plaintiff, *In re Shortsale Antitrust Litig.*, No. 06 Civ. 2859, (S.D.N.Y. Aug. 21, 2007), 2007 WL 2959914 (interpreting the fourth factor from *Billing* as whether the activity “impact[s] the proper functioning of the securities markets”).

¹²⁹ *Billing*, 127 S. Ct. at 2392–93 (“Indeed, the SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage.”). The Court pointed specifically to

15 U.S.C. §§ 77b(a)(3), 77j, 77z-2 (granting the SEC power to regulate the process of book-building, solicitations of “indications of interest,” and communications between underwriting participants and their customers . . .); § 78o(c)(2)(D) (granting the SEC power to define and prevent through rules and regulations acts and practices that are fraudulent, deceptive, or manipulative); §§ 78i(a)(6) (similar); § 78j(b) (similar).

Id. at 2393.

¹³⁰ *Id.*

¹³¹ See *id.* at 2392–93; Karmel, *supra* note 117, at 7 (“The only issue, to seriously examine, therefore, was incompatibility.”); Powell & Freimuth, *supra* note 116, at 7.

¹³² *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 142 (2d Cir. 2005), *rev’d sub nom.* *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007); see 15 U.S.C. §§ 77q(a), § 78j(b) (2000); 17 C.F.R. § 240.10b-5 (2007). These provisions of the Securities Act and the Exchange Act are part of the general anti-fraud and anti-manipulation provisions of the federal securities laws. See, e.g., Anti-Manipulation Rules Concerning Securities Offerings, 69 Fed. Reg. 75,774, 75,774 (Dec. 17, 2004). The SEC had proposed a rule expressly prohibiting tying arrangements in 1974. It withdrew the rule since tying was already prohibited by the “existing anti-fraud and anti-manipulation provisions of the federal securities laws.” *Billing*, 426 F.3d at 142 n.10 (quoting Withdrawal of Proposed Rules Under the Securities Exchange

who had engaged in tying and laddering agreements.¹³³ Furthermore, the SEC had extensively reviewed tying and laddering agreements and had continuously exercised its authority by proposing rules and issuing statements concerning such agreements.¹³⁴ The investors argued that, since the SEC and the antitrust laws both prohibited such anticompetitive conduct, there could be no “conflict” or “incompatibility” between the two laws.¹³⁵

The Court, however, rejected this argument, holding that even though the SEC had disapproved of the banks’ conduct—and, *arguendo*, would continue to disapprove of it—“securities law and antitrust law are clearly incompatible.”¹³⁶ This decision was largely premised on the following policy considerations:¹³⁷ (1) the difficulty of lower courts in determining permissible from impermissible behavior, and the danger of inconsistent decisions; (2) that the benefits of any antitrust enforcement in addition to SEC regulation would be slight; and (3) that the costs of antitrust litigation would be significant.¹³⁸ First, to permit antitrust actions in the immediate case would present a “legal line-drawing problem”¹³⁹ since lower courts lack the requisite expertise to determine which syndicate practices are permitted and which are forbidden.¹⁴⁰ The Court held that the SEC, with its superior expertise, is in a better position to distinguish what

Act of 1934, Exchange Act Release No. 26,182 (Oct. 14, 1988), 53 Fed. Reg. 41,206, 41,207 (Oct. 20, 1988)). The SEC adopted “Regulation M” (17 C.F.R. §§ 242.100–05) in 1996 to prevent price manipulation of securities. Included in the SEC’s interpretation of prohibited activities under Regulation M are tying and laddering agreements. *In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 515 (S.D.N.Y. 2003), *vacated sub nom. Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005), *rev’d sub nom. Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

¹³³ *Billing*, 127 S. Ct. at 2393.

¹³⁴ See *Billing*, 426 F.3d at 142–43, 170; *IPO Antitrust Litig.*, 287 F. Supp. 2d at 514–15. As an example of the SEC exercising its authority in this area, the *Billing* Court mentioned that the SEC has defined in detail “what underwriters may and may not do and say during their road shows.” *Billing*, 127 S. Ct. at 2393.

¹³⁵ *Billing*, 127 S. Ct. at 2394.

¹³⁶ *Id.*

¹³⁷ See Karmel, *supra* note 117, at 7 (“In finding such incompatibility, the Court exhibited a policy animus to private antitrust actions in the securities area.”).

¹³⁸ *Billing*, 127 S. Ct. at 2394–97; Powell & Freimuth, *supra* note 116, at 7.

¹³⁹ *Billing*, 127 S. Ct. at 2394.

¹⁴⁰ *Id.* at 2386; see also Howie, *supra* note 114, at 61 (“[T]he Court’s decision amounts to a troubling no-confidence vote in the lower federal courts, at least for complex antitrust cases.”).

practices should be forbidden, rhetorically asking, "[a]nd who but the SEC itself could do so with confidence?"¹⁴¹ The Court also maintained that permitting complex antitrust lawsuits could result in numerous, inconsistent results from non-expert judges and juries¹⁴² and that, in this context, mistakes by lower courts were "unusually likely."¹⁴³ While earlier case law had warned of the danger of "conflicting standards" from antitrust laws and the regulatory scheme if antitrust lawsuits were permitted,¹⁴⁴ the *Billing* Court moved away from this "bilateral" approach,¹⁴⁵ holding that permitting suits could produce multiple standards that could chill the activities of underwriting syndicates with disastrous effects on the market.¹⁴⁶

This focus on the potential outcome of litigation continues in the Court's subsequent "costs-benefits" analysis.¹⁴⁷ The Court held that since the SEC actively regulates and forbids the activity in question, the benefits of additional enforcement by antitrust litigation are minimal.¹⁴⁸ The Court's analysis echoes its earlier decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.¹⁴⁹ The Court in *Trinko* held that

¹⁴¹ *Billing*, 127 S. Ct. at 2395.

¹⁴² *Id.*; see also *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004). In *Trinko*, an antitrust case concerning the telecommunications industry, the Court noted that the regulatory scheme established by the Telecommunications Act of 1996 was a "good candidate" for implied immunity, in order to "avoid the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by courts exercising jurisdiction under antitrust laws.'" *Id.* (quoting *United States v. NASD*, 422 U.S. 694, 734 (1975)). This language from *Trinko*, however, has been categorized as dicta since *Trinko* was not an implied immunity case, as the Act contained a saving clause. See Falvey & Kleit, *supra* note 13, at 154–55.

¹⁴³ *Billing*, 127 S. Ct. at 2396.

¹⁴⁴ See *NASD*, 422 U.S. at 734 (holding that the Court has found implied immunity to assure that the regulatory agency could carry out its responsibilities "free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws"); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 689 (1975).

¹⁴⁵ See Hovenkamp, *Antitrust Violations*, *supra* note 6, at 629 ("[T]he problem of inconsistent outcomes is not simply bilateral. Once regulation of an industry is entrusted to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another as well.").

¹⁴⁶ *Billing*, 127 S. Ct. at 2396.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ 540 U.S. 398 (2004). *Trinko* involved an antitrust challenge and the Telecommunications Act of 1996. The Act imposes upon an incumbent local exchange carrier ("LEC") the obligation to share its telephone network with

when there is a regulatory structure that is “designed to deter and remedy anticompetitive harm,” the additional benefit provided by antitrust enforcement “will tend to be small.”¹⁵⁰ Such a regulatory scheme, however, must perform an “antitrust function” in order to render additional enforcement unnecessary.¹⁵¹

III. THE PROPER STANDARD FOR “CLEAR REPUGNANCY”

A. *The Billing Standard*

The *Billing* Court’s reading of the third factor, that securities and antitrust law are incompatible due to the possibility of mistakes by lower courts, created a new, problematic standard for determining that a “clear repugnancy” exists. In evaluating a repugnancy, courts have generally been bound by the *Silver* necessity standard¹⁵² and the principle that courts must try to reconcile the operation of “two statutory schemes whenever, and to the greatest extent, possible.”¹⁵³ Also pertinent to this analysis is whether Congress, by creating this regulatory scheme, intended to entrust antitrust enforcement exclusively to the agency.¹⁵⁴ *Billing*, however, departs from some of the most basic and long-held tenets of antitrust immunity analysis to create a new standard for determining that there is a conflict between the two bodies of law.

The other factors employed by *Billing* to determine “clear repugnancy” rest on more solid precedent and provide a useful

competitors. Verizon was the incumbent LEC for New York State and had signed an agreement to make its networks available to rivals, such as AT&T. The respondent, an AT&T customer, alleged that Verizon had filled rivals’ orders on a discriminatory basis as part of an anticompetitive scheme in violation of the Sherman Act. *Id.* at 402–05.

¹⁵⁰ *Id.* at 412.

¹⁵¹ See *Billing*, 127 S. Ct. at 2390 (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 358 (1963), *superseded by statute*, 15 U.S.C.A. §§ 78c(f), 78w(a)(2) (West 2006)); *Trinko, LLP*, 540 U.S. at 412; discussion *infra* Part III.A.

¹⁵² See, e.g., *United States v. NASD*, 422 U.S. 694, 739 (1975) (White, J., dissenting); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 683 (1975); *Strobl v. N.Y. Mercantile Exch.*, 768 F.2d 22, 26 (2d Cir. 1985).

¹⁵³ *Am. Agric. Movement, Inc. v. Bd. of Trade*, 977 F.2d 1147, 1158 (7th Cir. 1992); see, e.g., *Gordon*, 422 U.S. at 683.

¹⁵⁴ *FLOYD & SULLIVAN*, *supra* note 18, § 3.4.1; see *Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 389 (1981); *Am. Agric. Movement*, 977 F.2d at 1158; *In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305, 1312 (7th Cir. 1985).

starting point for clarifying implied immunity principles. First, the Court held that the activity in question must fall under the authority of the SEC for a clear repugnancy to exist.¹⁵⁵ The Court required more than simply the presence of a pervasive regulatory scheme.¹⁵⁶ It also required that Congress have intended for the conduct to fall under the agency's jurisdiction.¹⁵⁷ It was this factor that was determinative in denying immunity in *Silver* and in granting immunity in *Gordon*.¹⁵⁸

Second, the regulatory agency must have "exercised" that authority.¹⁵⁹ An agency's exercise of authority, however, is only truly effective when it performs an "antitrust function" by taking competitive considerations into account when creating or enforcing its policies.¹⁶⁰ For example, in *Silver*, the Court found that there was nothing in the regulatory scheme that performed the antitrust function since the SEC did not ensure that the exchanges would not apply their rules in a way that would unnecessarily restrict competition.¹⁶¹ The rationale for requiring the "antitrust function" is that, by considering antitrust concerns, the agency "leaves open a forum for antitrust policy" when there

¹⁵⁵ *Billing*, 127 S. Ct. at 2392. *But cf. Nat'l Gerimedical*, 452 U.S. at 389 ("Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge."); FLOYD & SULLIVAN, *supra* note 18, § 3.4.4.1 ("The existence of regulatory jurisdiction over the conduct at issue does not necessarily imply antitrust immunity . . .").

¹⁵⁶ *Gordon*, 422 U.S. at 688–89.

¹⁵⁷ *See id.* at 683–84.

¹⁵⁸ *See, e.g., id.* at 685; Falvey & Kleit, *supra* note 13, at 150 ("Although there was a comprehensive regulatory framework in place, there was no direct securities regulation addressing the telephone issue found in *Silver*. Accordingly, the Court denied the defense of Implied Immunity."); Steven Semeraro, *The Antitrust-Telecom Connection*, 40 SAN DIEGO L. REV. 555, 569 (2003) (noting that *Silver* rejected the SEC's "general power to adopt rules" as sufficient grounds for implied immunity).

¹⁵⁹ *See, e.g., Billing*, 127 S. Ct. at 2393.

¹⁶⁰ *See id.* at 2396; *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004) (noting that "the additional benefit to competition provided by antitrust enforcement will tend to be small" where other laws and regulatory structures are "designed to deter and remedy anticompetitive harm"); *Nat'l Gerimedical*, 452 U.S. at 390; *United States v. NASD*, 422 U.S. 694, 740–41 (1975) (White, J., dissenting); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 351 (1963); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 358 (1963), *superseded by statute*, 15 U.S.C.A. §§ 78c(f), 78w(a)(2) (West 2006); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 343 (1959).

¹⁶¹ *Silver*, 373 U.S. at 358–59; *see AREEDA & HOVENKAMP, supra* note 12, at ¶ 243d.

is a finding of implied immunity by a court.¹⁶² Furthermore, if Congress intended that competitive factors play a role in an agency decisions, but the role is circumscribed by the goals of the regulatory scheme, then implied immunity is justified.¹⁶³ Arguably, the “antitrust function” should not be read as synonymous with the standards of an antitrust court since this could easily defeat a regulatory scheme that must take factors in addition to competition into account.¹⁶⁴ The Court, however, has held that a regulatory agency must apply standards “similar to standards developed in antitrust law.”¹⁶⁵ If an agency is empowered only to consider the “public interest” and “convenience” in its decision-making, for example, rather than competitive considerations, this standard may be insufficient to support a finding of implied immunity.¹⁶⁶ The Court has not prescribed any specific standards for the agency’s “antitrust function,” but the Court’s decisions seem to indicate that an agency at least must take antitrust considerations into account, and that these concerns must be given sufficient weight.¹⁶⁷ In *Billing*, the Court determined that the antitrust function was satisfied because, when the SEC is engaged in rulemaking, it must consider “‘whether the action will promote efficiency, competition, and capital formation’”¹⁶⁸ and “‘the impact any such rule or regulation would have on competition.’”¹⁶⁹

It is not clear, though, how much of an exercise of authority by the agency is required. In *Gordon*, the SEC’s regulation of fixed commission rates had been active—the SEC had studied the practice and required major changes from the Exchange.¹⁷⁰ In *Billing*, the Court noted that the SEC had prescribed specific

¹⁶² See Parker C. Folse, III, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 TEX. L. REV. 751, 779 (1979).

¹⁶³ *Id.*

¹⁶⁴ See *supra* note 6 and accompanying text.

¹⁶⁵ See James F. Ponsoldt, *Immunity Doctrine, Efficiency Promotion, and the Applicability of Federal Antitrust Law to State-Approved Hospital Acquisitions*, 12 J. CORP. L. 37, 53 (1986).

¹⁶⁶ See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373 (1973); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 343–44, 350 n.18 (1959).

¹⁶⁷ See Ponsoldt, *supra* note 165, at 54 (discussing *United States v. Phila. Nat’l Bank*, 374 U.S. 321 (1963)).

¹⁶⁸ *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2396 (2007) (quoting 15 U.S.C. § 77b(b) (2000)).

¹⁶⁹ *Id.* (quoting 15 U.S.C.A. § 78w(a)(2) (West 2006)).

¹⁷⁰ See *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 690–91 (1975).

rules for underwriters and brought actions against underwriters who violated those rules.¹⁷¹ The *Trinko* Court also considered how well the regulatory scheme was functioning¹⁷² and pointed to the fact that the FCC had imposed disciplinary measures and regulations for the challenged conduct.¹⁷³

When Congress has granted the SEC pervasive supervisory authority over the challenged conduct, affirmative action by the SEC is not necessary for a repugnancy to exist. In cases such as *NASD* and *Friedman*, federal securities laws granted the SEC pervasive supervisory power over the challenged conduct, such that the conduct could be permitted subject to SEC approval.¹⁷⁴ When Congress has vested the SEC with a certain level of autonomy, an antitrust suit may offend the authority granted to the SEC.¹⁷⁵ Therefore, a repugnancy may still exist even if the SEC has not taken affirmative action. The Second Circuit's decision in *Stock Options* clarifies this principle further. In *Stock Options*, even though the SEC disapproved of options trading on multiple exchanges, it retained the power to make rules permitting the practice. *Stock Options* illustrates that, in an instance of pervasive supervisory power, the SEC's current policy or action is not determinative, rather the authority granted to the SEC creates a repugnancy.¹⁷⁶

In light of these cases, the more appropriate requirement for cases such as *Billing* is that the agency must have "actively regulated" the activity by "scrutiniz[ing] and approv[ing]" the activity.¹⁷⁷ Antitrust immunity is inappropriate when an

¹⁷¹ See *Billing*, 127 S. Ct. at 2393.

¹⁷² See AREEDA & HOVENKAMP, *supra* note 12, ¶ 243g.

¹⁷³ See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 413 (2004).

¹⁷⁴ See *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 171 (2d Cir. 2005), *rev'd sub nom. Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

¹⁷⁵ See *id.* at 160–61; see also *Folse*, *supra* note 162, at 788 (arguing that, in certain circumstances in which autonomy has been conferred on a regulatory agency, an antitrust suit may upset that autonomy).

¹⁷⁶ See *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134, 149 (2d Cir. 2003).

¹⁷⁷ *Am. Agric. Movement, Inc. v. Bd. of Trade*, 977 F.2d 1147, 1158–59 (7th Cir. 1992); see *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 689 (1975); see also AREEDA & HOVENKAMP, *supra* note 12, ¶ 243a2. When an agency has authority over a practice and has exercised that authority "with some thoroughness," antitrust laws may be "completely ousted." *Id.* Courts, however, have also found implied immunity when there is unexercised administrative power to control conduct, if agency

agency's approval is not manifested by affirmative action but by mere "acquiescence, or the failure to take action."¹⁷⁸ In *Billing*, the SEC had the authority to regulate the underwriting process¹⁷⁹ but did not have broad oversight authority; therefore, it was appropriate for the Court to point to examples of the SEC's "active" regulation.¹⁸⁰

B. Agency Approval of the Activity Is Necessary for a Finding of Clear Repugnancy

Traditionally, a "repugnancy" between antitrust laws and a regulatory statute has been understood to exist in those instances when an agency has reviewed the activity and approved it.¹⁸¹ The majority of implied immunity cases have concerned facts in keeping with this definition; that is, a repugnancy existed when the regulatory agency had approved of conduct that would otherwise be prohibited by antitrust laws.¹⁸² *Billing* is factually distinct from these prior cases, in that both the SEC and the antitrust laws prohibited tying and laddering, and a finding of implied immunity under these circumstances departed from established case law. While courts have stated that agency supervision of an activity may take many forms, if an agency has considered a particular activity but has "expressly denied it approval or expressly declared it inconsistent with regulatory goals, a claim of implied immunity must be rejected because of the failure to satisfy the threshold requirement of a

expertise is important for intelligent decision making (e.g. *NASD; Friedman; Stock Options*). *Id.* The issue of whether a regulatory agency must approve of the challenged conduct in order for antitrust immunity to apply is discussed *infra* Part III.B.

¹⁷⁸ See *Am. Agric. Movement*, 977 F.2d at 1163–65 (finding implied immunity inappropriate when the agency's supervision of the activity was "casual and modest"); see also *Sound, Inc. v. Am. Tel. & Tel. Co.*, 631 F.2d 1324, 1330 (8th Cir. 1980) (denying implied immunity when FCC enforcement had been "sluggish"); *Hovenkamp, Antitrust Violations*, *supra* note 6, at 629, 632.

¹⁷⁹ See *Hovenkamp, Antitrust Violations*, *supra* note 6, at 629 ("Most aspects of the initial public offering process . . . are subject to the regulatory supervision of the SEC.").

¹⁸⁰ See *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2393 (2007).

¹⁸¹ *AREEDA & HOVENKAMP*, *supra* note 12, ¶ 243e3; see *CableAmerica Corp. v. FTC*, 795 F. Supp. 1082, 1092 (N.D. Ala. 1992) (holding that no repugnancy existed since defendant's conduct had not been approved or authorized by the FTC).

¹⁸² See *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 169 (2d Cir. 2005), *rev'd sub nom. Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

repugnancy between the regulatory and antitrust regimes.”¹⁸³ Approval of the challenged activity is an essential element for repugnancy, and courts have denied implied immunity when the activity was “neither compelled nor approved” by the regulatory agency.¹⁸⁴

When an agency disapproves of an activity, this typically refutes any claim of implied immunity.¹⁸⁵ For a repugnancy to exist, application of the two laws must produce “differing results”¹⁸⁶ and implied immunity is not appropriate, unless the regulatory agency has “policies that directly contradict antitrust principles.”¹⁸⁷ When both laws prohibit the same sort of conduct, there can be no repugnancy since enforcing one would support the other.¹⁸⁸ This approach can be reconciled with the Second Circuit cases that placed an emphasis on the authority of the SEC to regulate the conduct in question, since, in both cases, the SEC had studied the practice but had not condemned it.¹⁸⁹ In those cases, the SEC still had the “potential” to permit the

¹⁸³ *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 462 F. Supp. 1072, 1083 (N.D. Ill. 1978).

¹⁸⁴ *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 389 (1981); *see also Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 299–300, 306 (1973); *Am. Agric. Movement, Inc. v. Bd. of Trade*, 977 F.2d 1147, 1158 (7th Cir. 1992) (defining conflict as conduct that would be prohibited under antitrust laws and justified or required under the regulatory scheme).

¹⁸⁵ *FLOYD & SULLIVAN*, *supra* note 18, § 3.4.7; *see also Ricci*, 409 U.S. at 304 (holding that, if the Commodities Exchange Commission was to determine that the activity was in violation of its rules, “the antitrust action should very likely take its normal course”); *Strobl v. N.Y. Mercantile Exch.*, 768 F.2d 22, 28 (2d Cir. 1985); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1105 (7th Cir. 1983); *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 731–32 (9th Cir. 1981); *Ne. Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 82–83 (2d Cir. 1981); *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 460 F. Supp. 1359, 1377–78 (D. Haw. 1978).

¹⁸⁶ Darren Bush, *Mission Creep: Antitrust Immunities as Applied to Deregulated Industries*, 2006 UTAH L. REV. 761, 784 (2006) (quoting Balter & Day, *supra* note 56, at 465).

¹⁸⁷ Falvey & Kleit, *supra* note 13, at 155.

¹⁸⁸ *See Sound, Inc. v. Am. Tel. & Tel. Co.*, 631 F.2d 1324, 1329–30 (8th Cir. 1980) (indicating there is no repugnancy if allowing an antitrust suit would not conflict with proper application of another statute); *see also AREEDA & HOVENKAMP*, *supra* note 12, ¶ 243e3 (“Clearly, no ‘repugnancy’ exists between a regulatory regime and antitrust policy where enforcing the latter would support the former.”).

¹⁸⁹ *See Hovenkamp, Antitrust Violations*, *supra* note 6, at 630–31.

activity in question,¹⁹⁰ as opposed to cases such as *Billing*, when the SEC had exercised its authority to condemn the practice.

It seems more difficult to finesse even a potential conflict in cases when the agency has clearly spoken and is in harmony with antitrust laws.¹⁹¹ *Billing* is distinguishable from prior cases, since the SEC did not have pervasive supervisory authority over tying and laddering agreements, making a potential conflict unlikely. Congress did not explicitly grant the SEC the power to review such agreements and approve or disapprove of the agreements at its discretion. Thus, *Billing* is not a case like *Friedman*, which noted that the Exchange Act permits “a little price manipulation” to further the SEC’s goals;¹⁹² rather, the agreements fell under the SEC’s congressionally-mandated duty to prohibit fraudulent and manipulative practices.¹⁹³ Even the SEC could not envision a potential scenario when it could permit tying and laddering, which it had deemed to be fraudulent conduct.¹⁹⁴ Pervasive supervisory authority is more likely to be present when the SEC has authority over self-regulatory organizations (“SROs”),¹⁹⁵ since, as was the case in *NASD*, the SEC will usually have the power to review, approve, and order changes in the SRO’s rules.¹⁹⁶ When this is the case, an antitrust suit could challenge the autonomy granted to the SEC, and a repugnancy would exist.¹⁹⁷ This was not the nature of the SEC’s authority over the agreements in *Billing*; the SEC had clearly and consistently disapproved of tying and laddering agreements

¹⁹⁰ See *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 162 (2d Cir. 2005), *rev’d sub nom.* *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007). The Second Circuit held that its precedents in *Finnegan*, *Friedman*, and *Stock Options* stand for the proposition that a conflict is possible when there is “potential” for the agency to permit the challenged conduct. *Id.*

¹⁹¹ See *Folse*, *supra* note 162, at 789 (“For example, it is unlikely that an antitrust suit seeking damages for conduct that has been independently declared illegal by the agency will substantially affect the exercise of regulatory autonomy since the agency disapproves of the conduct.”).

¹⁹² *Billing*, 426 F.3d at 162 (quoting *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 800 (2d Cir. 2002)).

¹⁹³ See *id.* (“[A]n agency’s power to review, if coupled with an obligation to prohibit particular anticompetitive conduct, will not create conflict.”).

¹⁹⁴ *Id.* at 170 (“The [SEC stated] that it is difficult to envision the circumstances in which conduct similar to that alleged in the complaint might be permitted.” (internal quotation marks omitted)).

¹⁹⁵ See *id.* at 171 (holding that SRO’s have a “special status” that the defendants in *Billing* could not claim).

¹⁹⁶ *Id.*

¹⁹⁷ See *id.*

and an antitrust action would not conflict with the SEC's authority.

The district court, in examining the class action suits that led to *Billing*, erred in analogizing the case to *Stock Options*, maintaining that, since the SEC had general authority over the underwriting process, there could still be a potential conflict assuming that at some point in the future, the SEC could permit tying and laddering.¹⁹⁸ *Billing*, however, differed from *Stock Options*, since the SEC had consistently condemned tying and laddering under its general duty to prevent fraudulent conduct.¹⁹⁹ The district court's reading cannot be the correct standard; it would mean that implied immunity would never be inappropriate since the SEC could always *potentially* change its position on an issue. The court's analogy to *Stock Options* is also misplaced since, in *Stock Options*, the SEC had pervasive supervisory authority over the exchanges concerning their rules for options trading rather than authority over private business conduct.²⁰⁰ In cases such as *Billing*, when both the SEC and the antitrust laws have prohibited private business conduct, implied immunity should not be found.

C. *The Costs-Benefits Approach Is Inappropriate for Implied Immunity Analysis*

The additional "costs-benefits" test for repugnancy propounded by *Trinko* and adopted by *Billing* is problematic, particularly in cases when securities and antitrust laws are in agreement. *Trinko* holds that when a regulatory agency is actively regulating the challenged conduct, and there is potential for error by the lower courts, antitrust suits are not worth the costs.²⁰¹ In reaching this conclusion, however, *Trinko* "did not rely on any of the established immunity doctrines."²⁰² Instead,

¹⁹⁸ See *In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 510 (S.D.N.Y. 2003), *vacated sub nom. Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005), *rev'd sub nom. Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

¹⁹⁹ See, e.g., *Billing*, 426 F.3d at 141-43.

²⁰⁰ See *In re Stock Exchs. Options Trading Antitrust Litig.*, No. 1283, 2001 WL 128325, at *1 (S.D.N.Y. Feb. 15, 2001), *aff'd sub nom. Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134 (2d Cir. 2003).

²⁰¹ See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004).

²⁰² Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM.

Trinko signaled a shift in immunity analysis from a focus on “authority” to the “outcome” of potential litigation.²⁰³ This is problematic since holding that a well-functioning regulatory agency alone is sufficient to justify immunity runs perilously close to the “mere presence of a regulatory scheme” argument previously rejected by the Court.²⁰⁴

While courts have previously addressed the danger of “conflicting mandates” in their immunity analysis, this concern is not truly applicable to cases such as *Billing*, where both laws are in harmony. In such a case, the regulatory scheme does not create the potential for “irreconcilable mandates,” since the SEC could not compel the conduct prohibited by antitrust laws.²⁰⁵ Of course, *Trinko* and *Billing* are concerned not simply with this bilateral view, but with the danger of multiple, inconsistent outcomes from judges and juries. While it may be argued that permitting antitrust lawsuits would subject the securities industry to parallel track regulation that could produce inconsistent outcomes, thus interfering with the SEC’s power to effectively regulate the industry,²⁰⁶ this argument is harder to maintain when both bodies of law are in harmony. First, “antitrust laws are not so inflexible as to deny consideration of government regulation,”²⁰⁷ so antitrust courts may adjust their rules in recognition of government regulation.²⁰⁸ Thus, the chances are small that an antitrust court would produce a divergent outcome when both antitrust laws and the SEC

BUS. L. REV. 335, 354 (2004); see also Ray G. Besing, *The Intersection of Sherman Act Section 2 and the Telecommunications Act of 1996: What Should Congress Do?*, 13 COMMLAW CONCEPTS 1, 18–19 (2005) (arguing that the *Trinko* Court “abandoned settled implied immunity law by failing to rely upon the Court’s own precedents”).

²⁰³ See AREEDA & HOVENKAMP, *supra* note 12, ¶ 243g1.

²⁰⁴ See, e.g., *Nat’l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 389 (1981) (holding that the mere presence of a regulatory scheme does not justify a finding of implied immunity “with respect to every action taken within the industry”); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1102 (7th Cir. 1983); *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 729 (9th Cir. 1981).

²⁰⁵ See *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2395–96 (2007); *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 169 (2d Cir. 2005), *rev’d sub nom.* *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

²⁰⁶ See Hovenkamp, *Antitrust Violations*, *supra* note 6, at 628–30.

²⁰⁷ *Mid-Tex. Commc’ns Sys. v. Am. Tel. & Tel. Co.*, 615 F.2d 1372, 1385 (5th Cir. 1980).

²⁰⁸ *Billing*, 426 F.2d at 166 (quoting AREEDA & HOVENKAMP, *supra* note 12, ¶ 240c3).

prohibit the activity. Furthermore, permitting an antitrust suit would not interfere with the SEC's authority. When the SEC has already prohibited a practice, application of antitrust laws would not curtail its power or "render[] nugatory" any provision of the securities laws.²⁰⁹

The cost-benefit analysis of *Trinko* and *Billing* creates a new standard for repugnancy that is too broad to harmonize with the rules of prior case law.²¹⁰ Most courts have clung to the *Silver* standard, which states that immunity may be found only if necessary to make securities laws work and, even then, only to the minimum extent necessary.²¹¹ The proper approach is to try to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."²¹² Subsequent courts have interpreted this principle as making findings of implied immunity "rare" rather than the norm.²¹³ Implied immunity is dependent on the finding of an "actual repugnancy" rather than simply a "perceived repugnancy" between the regulatory statute and antitrust laws.²¹⁴ In prior cases, however, an actual conflict or the potential for conflict meant a conflict between the antitrust laws and the regulatory scheme, not merely the possibility that a lower court could rule in way that differed from the opinion of the regulatory agency. *Billing* has substituted the possibility of differing lower court opinions for general antitrust laws in implied immunity analysis to create a conflict where none truly exists.²¹⁵ If this reading of

²⁰⁹ *Id.* at 169; see *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 691 (1975) ("Implied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work as intended; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.").

²¹⁰ See *Howie*, *supra* note 114, at 61 ("Rather than following the admonition in *Silver* to minimize the scope of implied repeal of antitrust law, [*Billing*] simply conferred broad-scale immunity."); see also *Powell & Freimuth*, *supra* note 116, at 7.

²¹¹ See *United States v. NASD*, 422 U.S. 694, 739 (1975); *Gordon*, 422 U.S. at 683; *Strobl v. N.Y. Mercantile Exch.*, 768 F.2d 22, 26 (2d Cir. 1985).

²¹² *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963), *superseded by statute*, 15 U.S.C.A. §§ 78c(f), 78w(a)(2) (West 2006).

²¹³ *Am. Agric. Movement, Inc. v. Bd. of Trade*, 977 F.2d 1147, 1158 (7th Cir. 1992); see, e.g., *NASD*, 422 U.S. at 719-20 ("Implied antitrust immunity is not favored."); *Finnegan v. Campeau Corp.*, 915 F.2d 824, 828 (2d Cir. 1990) (holding that implied immunity is not favored and not to be "casually . . . allowed" (quoting *Gordon*, 422 U.S. at 682)); *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 726 (9th Cir. 1981) ("[A]ntitrust immunities are to be strictly construed and not lightly inferred.").

²¹⁴ *Phonetele*, 664 F.2d at 732.

²¹⁵ See *Keith Sharfman, Credit Suisse, Regulatory Immunity, and the Shrinking*

"conflict" is the standard, the application of implied antitrust immunity is limitless. It is no longer the possibility of conflict between two bodies of law that is the concern, but rather the possible application of antitrust laws by lower courts that must be considered. Since it may always be argued that different courts could apply the law in different ways, implied immunity would always be appropriate. This is not, however, the standard of prior case law. *Billing* has created a new standard that, unlike the standard espoused by *Silver*, *Gordon*, and *NASD*, confers an overly-broad right of implied immunity to regulated industries and drastically limits a party's ability to receive remedies for anticompetitive conduct.

Under the *Billing* standard, "repugnancy" does not truly exist as a requirement for immunity. The Court has replaced "repugnancy" with incompatibility, or the potential of inconsistent results from lower courts. In doing so, the Court has departed from not only the "clear repugnancy" standard, but the admonitions of the *Silver* court, the lodestar of antitrust immunity analysis for over forty years.²¹⁶ Although the *Billing* Court pays lip service to the *Silver* necessity standard, this concern does not truly factor into the Court's analysis. Contrary to *Billing*, finding a conflict alone should not be sufficient; there must be "a determination that repeal of the antitrust laws is necessary to make the regulatory act work."²¹⁷ In *Gordon*, for example, immunity was necessary to make the securities laws function since Congress, in passing the Exchange Act, had intended for the SEC to determine whether commission rates were reasonable or not.²¹⁸ This is not the case in *Billing*, where

Scope of Antitrust, ESAPIENCE CENTER FOR COMPETITION POLICY, June 2007, at 3, available at <http://www.globalcompetitionpolicy.org/index.php?id=500&action=907> ("But *Credit Suisse* goes further . . . by creating the possibility of antitrust immunity even in cases of potential future incompatibility where an actually conflicting federal regulatory policy has yet to be clearly (or even at all) articulated.").

²¹⁶ See J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Remarks at the Bates White Fourth Annual Antitrust Conference: Has the Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence 3 (June 25, 2007) [hereinafter Rosch Speech] (arguing that *Billing* disregards the *Silver* necessity standard), available at 2007 WL 2506630 (F.T.C.).

²¹⁷ Bush, *supra* note 186, at 784.

²¹⁸ See *Gordon*, 422 U.S. at 691; see also *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 169 (2d Cir. 2005), *rev'd sub nom. Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct 2383 (2007). Similarly, in *Finnegan*, the Second Circuit held that "using the antitrust laws to forbid joint bidding would conflict with the Williams Act's instruction that the SEC regulate 'group' bids." *Billing*, 426 F.3d at

tying and laddering only fell under the SEC's jurisdiction in a general way, as part of the SEC's authority to prevent "fraud, deception, misrepresentation, and manipulation."²¹⁹ As such, immunity is not necessary to permit the proper functioning of federal securities laws.

If the only real requirement for immunity is simply the presence of a well-functioning regulatory agency and the potential for conflict among lower courts, then there would rarely be an instance when implied immunity would not be appropriate. Since antitrust cases are often complex, it could be easily argued that litigation could result in inconsistent results from non-expert judges and juries. This seems a far cry from the *Silver* necessity standard.

D. The Billing Decision Is Premised on the Court's Policy Against Private Securities Actions

The elephant in the room for *Billing* is the Court's underlying rationale of limiting securities lawsuits. The Court exhibited both a mistrust of judges and juries,²²⁰ as well as a hostility towards private securities actions.²²¹ *Billing* puts a particular emphasis on congressional intent to reduce unmeritorious securities litigation, as evidenced by the enactment of laws such as the Private Securities Litigation Reform Act (PSLRA); the Court saw a clear need to prevent plaintiffs from "dress[ing] what is essentially a securities complaint in antitrust clothing" to circumvent these laws.²²²

Billing and *Trinko*, along with the Court's recent decision in *Bell Atlantic Corp. v. Twombly*,²²³ are unique in that they take

169.

²¹⁹ *Billing*, 426 F.3d at 169.

²²⁰ Rosch Speech, *supra* note 216, at 3; see also Francis J. Facciolo, *When Deference Becomes Abdication: Immunizing Widespread Broker-Dealer Practices from Judicial Review Through the Possibility of SEC Oversight*, 73 MISS. L.J. 1, 2-3 (2003) (noting the hesitancy of courts in adjudicating complex securities regulation issues and that courts have tended to defer to the SEC to resolve these issues).

²²¹ *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2396 (2007); see also *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007) (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

²²² *Billing*, 127 S. Ct. at 2396; see also Memorandum from Skadden, Arps, Slate, Meagher & Flom LLP, Supreme Court Finds Antitrust Immunity in Securities Regulation Case 2 (June 19, 2007), http://www.skadden.com/content/Publications/Publications1273_0.pdf.

²²³ 127 S. Ct. 1955 (2007).

into account the “costs” of antitrust litigation in evaluating questions of implied immunity.²²⁴ Both *Billing* and *Trinko* are concerned with the danger of antitrust litigation producing inconsistent (and mistaken) standards that are “‘especially costly, because they chill the very conduct the antitrust laws are designed to protect.’”²²⁵ *Trinko* goes one step further, noting that courts would be ineffective in evaluating antitrust suits of this nature, which are likely to be “extremely numerous.”²²⁶ In addition to such cases being “highly technical,” cases would generally require continuous supervision on a day-to-day basis to prevent antitrust violations; due to the highly detailed knowledge required for such supervision, regulatory agencies could more effectively perform this function.²²⁷

Indeed, *Billing* and *Trinko* are better understood as part of a series of cases by the Court to limit litigation.²²⁸ In *Twombly* (a case not involving implied immunity), the plaintiffs had accused a telecommunications company and other local exchange carriers of violating the Sherman Act by engaging in anticompetitive behavior.²²⁹ The Court dismissed the antitrust action, holding that the plaintiffs’ complaint did not allege enough facts to show that they could win at trial.²³⁰ In order to survive a motion for dismissal, “[f]actual allegations must be enough to raise a right to relief above the speculative level.”²³¹ The Court’s ruling effectively raised the bar for how much information a plaintiff’s pleadings must show in order to proceed from the pleadings stage

²²⁴ Howie, *supra* note 114, at 61; Rosch Speech, *supra* note 216, at 3 (“[T]he Court’s recent decisions, reflect a discomfort with the costs and burdens of private antitrust litigation.”).

²²⁵ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)); see *Billing*, 127 S. Ct. at 2396; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984).

²²⁶ See *Trinko*, 540 U.S. at 414.

²²⁷ See *id.* at 414–15.

²²⁸ See Jess Bravin & Aaron Lucchetti, *Justices Harden Wall Street Armor—IPO Decision Gives Brokers Broad Antitrust Exemption in Latest Hit to Plaintiffs*, WALL ST. J., June 19, 2007, at A3 (noting that *Billing* is a “milestone” in the Court’s “recent movement to free markets from the cost and complications of plaintiff lawsuits”).

²²⁹ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1962–63 (2007).

²³⁰ *Id.* at 1974 (“Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

²³¹ *Id.* at 1965.

to discovery. *Twombly's* new standard has had clear effects beyond antitrust cases,²³² with the result that many plaintiffs may be deprived of their day in court.²³³ In reaching its decision, the Court pointed to the costs of discovery in an antitrust suit.²³⁴ Like *Billing*, *Twombly* recognized a need to weed out unmeritorious lawsuits, "lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people.'"²³⁵ This approach comports with a string of recent Supreme Court cases, such as *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,²³⁶ *Merrill Lynch v. Dabit*,²³⁷ and *Dura Pharmaceuticals, Inc. v. Broudo*,²³⁸ that have made it more difficult for plaintiffs to bring private securities actions.²³⁹ On second glance, the reasoning applied in *Billing* seems to flow more out of these policy considerations than traditional antitrust immunity analysis. The Court spent the bulk of its analysis

²³² See Wendy N. Davis, *Just the Facts, but More of Them: An Antitrust Ruling Is Proving To Be a Bigger Deal than Expected*, A.B.A. J., Oct. 2007, available at http://www.abajournal.com/magazine/just_the_facts_but_more_of_them.

²³³ *Id.* ("For example, cases where plaintiffs tend to find the crucial evidence during discovery, such as employment discrimination or conspiracy allegations, might now never make it to trial.").

²³⁴ See *Twombly*, 127 S. Ct. at 1969. *Twombly* bluntly notes that "antitrust discovery can be expensive." *Id.*; see also Davis, *supra* note 232.

²³⁵ *Twombly*, 127 S. Ct. at 1966.

²³⁶ 127 S. Ct. 2499, 2504–05 (2007) (holding that inferences of defendant's knowledge of wrongdoing must be as compelling as an opposing inference of non-fraudulent intent).

²³⁷ 547 U.S. 71, 87 (2006) (holding that the Securities Litigation Uniform Standards Act of 1998 pre-empts state law class actions).

²³⁸ 544 U.S. 336, 344–45 (2005) (holding that plaintiffs could not establish loss causation by alleging that a securities price was inflated through misrepresentation).

²³⁹ See Beth Bar, *Raising the Bar: Attorneys Tailor Strategy to High Court Rulings*, N.Y.L.J., July 12, 2007, at 5. During the same term as *Billing* and *Twombly*, the Supreme Court also limited a plaintiff's ability to bring an antitrust action in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2722 (2007), where the Court overruled its 96-year-old decision, *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and held that it is not a per se violation of antitrust laws for a manufacturer to set minimum resale prices. See Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2d 423, 436–37 (2007); cf. James Langenfeld & Daniel R. Shulman, *The Future of U.S. Federal Antitrust Enforcement: Learning from Past and Current Influences*, 8 SEDONA CONF. J. 1, 14 (2007). The authors point to a recent trend in antitrust cases before the Supreme Court. Since *Trinko*, government enforcement agencies have sided with defendants and argued for rulings that would make antitrust enforcement "more restricted and difficult," and that, in each case, the Court has ruled for the defendant, "even going beyond the relief sought by the Government." *Id.*

propounding the large costs—and small benefits—of litigation and its potentially negative effects on the market.²⁴⁰ While these considerations may be compelling, they are not truly a part of immunity analysis. Traditionally, the twin purposes of the “clear repugnancy” standard have been to allow the agency the freedom to carry out its regulatory mission and to protect the industry from inconsistent standards.²⁴¹ A costs-benefits analysis furthers neither of these purposes, and the potential costs of litigation cannot be equated with “repugnancy.”²⁴²

The Court has made it much more difficult for a plaintiff to seek a remedy from businesses for antitrust violations.²⁴³ After *Billing*, almost all securities activity that falls under the SEC’s regulation is immune from antitrust liability, leaving little or no room for private antitrust actions.²⁴⁴ The Court assumed that the presence of SEC regulation would naturally result in less of a need for antitrust enforcement.²⁴⁵ Even if the Court is correct in

²⁴⁰ See Adam H. Charnes & James J. Heffernan Jr., *Friendly to Corporations*, 29 NAT’L L.J. 10 (2007) (citing *Billing* and *Twombly* as evidence of a more pro-business direction for the Court). One prominent potential cost of securities litigation is the possibility of corporate flight to avoid U.S. securities suits. See Paul M. Kaplan, *The Credit Suisse Decision and U.S. Financial Markets*, DAILY DEAL, July 31, 2007, available at <http://www.globalcompetitionpolicy.org/index.php?id=515&action=907> (arguing that *Billing*, by limiting antitrust liability for the underwriting process, prevented the flight of capital from the U.S. to other financial markets, such as London); Jonathan C. Dickey, *Current Trends in Federal Securities Litigation*, in SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2007, 339, 358 (2007), available at 1620 PLI/CORP 339 (Westlaw) (discussing the Paulson Committee Report, which noted that, as securities action settlements increase “so too do the incentives for companies to try to evade private litigation under the U.S. securities laws by simply choosing to sell their shares elsewhere”). This concern was addressed directly by the Court in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, No. 06-43, 2008 U.S. LEXIS 1091 (Jan. 15, 2008). The Court noted that, if scheme liability were permitted, “[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here. . . . This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets.” *Id.* at *25.

²⁴¹ *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 732 (9th Cir. 1981).

²⁴² See *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2398 (2007) (Stevens, J., concurring) (“I would not suggest . . . that either the burdens of antitrust litigation or the risk ‘that antitrust courts are likely to make unusually serious mistakes’ . . . should play any role in the analysis of the question of law presented in a case such as this” (quoting majority opinion)).

²⁴³ *Chemerinsky*, *supra* note 239, at 436.

²⁴⁴ *Hill*, *supra* note 116 (“After *Billings*, [sic] virtually any activity subject to Securities and Exchange Commission regulation is likely immune from the antitrust laws.”).

²⁴⁵ *Id.*

painting *Billing's* antitrust claim as simply a "dressed up" securities claim, the Court does not consider the effect of its decision on traditional antitrust claims. While Congress has restricted plaintiffs' ability to bring securities actions in order to prevent frivolous suits, there is no similar legislation for antitrust suits.²⁴⁶ Although *Billing's* policy decision is drawn from securities legislation, its effects will be keenly felt in other areas of law. Indeed, that may be the most pressing problem of the *Billing* standard: that the standard could plausibly be applied to other regulated industries, thus preventing suits against a variety of firms, from airlines to drug manufacturers.²⁴⁷ Like *Twombly*, *Billing's* crippling effects on a plaintiff's ability to get to court could reach far beyond antitrust and securities.

This loss is of no small significance. The Supreme Court has recognized that Congress created treble damages remedies for antitrust violations to *encourage* private antitrust suits, since these private suits provide significant supplement to the limited resources available to government agencies for enforcing the antitrust laws.²⁴⁸ The availability of treble damages encourages

²⁴⁶ *Id.*

²⁴⁷ See Sharfman, *supra* note 215; see also Tony Mauro, *Investment Banks Granted Broad Antitrust Immunity*, N.Y.L.J., June 19, 2007, at 1 ("Justice Breyer's strong deference to the SEC could mark a new high-water mark for the regulatory state that could be applied in other contexts, including telecommunications and environmental law, where it could be argued that regulators have more expertise than courts."); Memorandum from Cleary Gottlieb Steen & Hamilton LLP to the Clients of Cleary Gottlieb, U.S. Supreme Court Holds Securities Laws Preclude Antitrust Lawsuits Concerning Initial Public Offering Underwriting Conduct (June 21, 2007) (on file with author) ("Beyond this particular context, the endorsement of regulation in *Credit Suisse* could be applied in other contexts where it can be argued that regulators have more expertise than courts."). *But cf.* Axcan Scandipharm Inc. v. Ethex Corp., No. 07-2556, 2007 WL 3095367, at *5 (D. Minn. Oct. 19, 2007). See generally Bruce H. Schneider, *Credit Suisse v. Billing and a Case for Antitrust Immunity for Mortgage Lenders Subject to Federal Regulation*, 124 BANKING L.J. 833 (2007). Axcan alleged that Ethex engaged in unfair competition in violation of the Lanham Act. The court held that *Billing* was inapplicable to the Lanham Act, and even if it was applicable, there was no serious conflict between the FDA's regulation of the drug market and Axcan's claims. *Id.* The court's holding was based, in part, on the fact that its research failed to locate any cases applying *Billing* to Lanham Act claims. *Id.* at *5 n.10. The *Billing* analysis has already been used by lower courts to dismiss antitrust claims in the securities industry. See *In re Short Sale Antitrust Litig.*, 527 F. Supp. 2d 253, 261 (S.D.N.Y. 2007) (holding that "there is clear incompatibility between the securities laws and antitrust laws within the short sale context").

²⁴⁸ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); see *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981) (explaining that the private action

private antitrust litigants to act as “‘private attorneys general’” by bringing actions against anticompetitive behavior that might otherwise escape the antitrust enforcement efforts of government agencies.²⁴⁹ The supervision provided by a regulatory agency cannot control all of the activities of a regulated firm, and budgetary constraints may limit its effectiveness.²⁵⁰ It is unlikely that the “overworked and understaffed” SEC would be able to prevent all antitrust violations within the securities markets.²⁵¹ In much recent securities law jurisprudence, courts have often chosen to defer to the SEC when possible, thus subjecting cases to “minimal judicial review.”²⁵² Such deference to an agency, however, is only appropriate when the agency has superior resources or experience—otherwise, a court is the better vehicle for adjudication.²⁵³ Furthermore, while a regulatory agency may be able to provide the equivalent of injunctive relief to aggrieved parties, the agency cannot provide private damages, and certainly not treble damages.²⁵⁴ Thus, the “flexible arsenal of

“supplements federal enforcement and fulfills the objects of the statutory scheme”).

²⁴⁹ *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130–31 (1969)).

²⁵⁰ AREEDA & HOVENKAMP, *supra* note 12, ¶ 240b2.

²⁵¹ *Cf.* Deborah Brewster, *Rules to Target Bigger Hedge Funds*, FIN. TIMES, Jan. 8, 2004 (arguing that proposed SEC supervision of hedge funds could be ineffective since “the understaffed SEC might not be able to cope with processing 6,000 fund registrations”); Frederick P. Gabriel Jr. & David Hoffman, *Talk Does Little to Inspire or Provoke*, INVESTMENT NEWS, May 27, 2002, at 3 (noting that former SEC Chairman Harvey Pitt was concerned that the SEC’s role could be limited due to understaffing); Anya Schiffrin, *A Big Win for the Small Investor—SEC Bans Selective Information Disclosure—Government Activity*, INDUSTRY STANDARD, Aug. 21, 2000, available at http://findarticles.com/p/articles/mi_m0HWW/is_32_3/ai_66672333 (noting that, despite the adoption of Regulation FD prohibiting companies from selectively disclosing information, “only the most egregious offenders are likely to be punished by an overworked and understaffed SEC”); *see also* Judith Burns, *Moving the Market: Enforcement Cases by SEC Fall Again; Focus on Late Filers*, WALL ST. J., Nov. 3, 2006, at C3 (“Declining enforcement cases comes as the SEC’s budget has been flat for several years and its enforcement-division staff fell 3.5% from a year earlier. Some experts think the SEC’s budget would need to increase three- or four-fold for it to be sufficiently funded.”); David Rogers, *Spending Plan Packs Business Perks—House and Senate Leaders Seek Conservative Support for \$821 Billion Package*, WALL ST. J., Nov. 24, 2003, at A4 (noting that despite a “growing mutual-fund scandal,” the SEC “will lose a third of the \$96 million budget increase it expected”).

²⁵² *See* Facciolo, *supra* note 220, at 5.

²⁵³ *See id.* at 93.

²⁵⁴ *See* AREEDA & HOVENKAMP, *supra* note 12, ¶ 240b2.

antitrust remedies"—injunction, private damages, and criminal sanctions—would be lost, replaced by cease and desist orders, rules, and fines, which do not benefit the aggrieved party.²⁵⁵

Courts may also be "more skeptical than regulators about industry claims of efficiency or the social benefits of restraints on competition," while an agency may be more sympathetic to the claims of regulated firms, and treat the industry with "undue deference."²⁵⁶ According to the regulatory capture thesis, regulatory agencies are acutely susceptible to the influence of the very industries they regulate and may unduly favor the interests of the industry.²⁵⁷ The SEC is subject to the influence of powerful interest groups,²⁵⁸ which could compromise the agency's ability to effectively address antitrust violations by the industry.²⁵⁹ The SEC could be prone to tailor its policies and enforcement to suit the industry, rather than the best interests of investors. Judicial

²⁵⁵ *Id.* ¶ 240c4; see Falvey & Kleit, *supra* note 13, at 176 ("[R]egulatory agencies may not be in a position to grant aggrieved firms effective relief, and courts should be reluctant to grant parties antitrust immunity.").

²⁵⁶ See AREEDA & HOVENKAMP, *supra* note 12, ¶ 240c4.

²⁵⁷ Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 AM. J. COMP. L. 615, 635 (2006); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997).

²⁵⁸ See Facciolo, *supra* note 220, at 87-88; *Hedge Funds and Independent Analysts: How Independent Are Their Relationships?: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Gary J. Aguirre, Former Investigator, Securities and Exchange Commission) ("Powerful interests want the SEC to stay just the way it is or, better yet, to become even weaker. . . . Those interests know how to reward friends and punish perceived enemies. Their tentacles reach far."); see also Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Towards a Synthesis*, 6 J.L. ECON. & ORG. 167, 169-70 (1990).

²⁵⁹ See *Mutual Fund Trading Abuses: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Eric W. Zitzewitz, Assistant Professor of Economics, Stanford Graduate School of Business) ("[T]here has been in some cases a striking similarity between what the industry has asked for and what the SEC has proposed."). An example of such deference by the SEC occurred during the recent investigation into Pequot Capital Management, a large hedge fund. A congressional report noted that among the SEC's failings in the investigation were delays in the investigation, disclosure of sensitive information to opposing counsel, and the "special treatment" of a prominent Wall Street executive that resulted in the postponement of his interview until after the case's statute of limitations had expired. See 153 CONG. REC. S10,889 (daily ed. Aug. 3, 2007) (statement of Sen. Grassley); see also Gretchen Morgenson & Walt Bogdanich, *S.E.C. Erred on Pequot, Report Says*, N.Y. TIMES, Aug. 4, 2007, at C1.

review remains necessary to counteract the effects of regulatory capture and more thoroughly combat antitrust violations.²⁶⁰

It is arguably Congress' duty, rather than the Court's, to limit jurisdiction to this extent. Congress has chosen to limit securities class actions through passage of the Private Securities Litigation Reform Act and the Securities Litigation Uniform Standards Act²⁶¹ and has not created similar restrictions for antitrust suits.²⁶² Also, as Justice Thomas argued in his dissent in *Billing*, the Securities Act and the Exchange Act contain broad saving clauses, preserving a party's right to other remedies at law.²⁶³ Both section 16 of the Securities Act and section 28 of the Exchange Act provide that the rights and remedies offered by the Act "shall be in addition to any and all other rights and remedies that may exist at law or in equity."²⁶⁴ The Court has previously read these provisions broadly, and emphasized the fact that the remedies of the Securities Act and the Exchange Act are to be supplemented by "any and all" additional remedies.²⁶⁵ Also, the *Trinko* Court recognized the Telecommunications Act's saving clause as "bar[ring] a finding of implied immunity."²⁶⁶ Given the plain language of the securities saving clauses and the Court's

²⁶⁰ See Merrill, *supra* note 257, at 1052.

²⁶¹ See 15 U.S.C. §§ 78bb(f)(1)(A), 78u-4(b)(2) (2000); see also Edward D. Cavanagh, *Plead a Little: The Defense May Beg for More. But the Supreme Court Should Not Raise Pleading Standards for Antitrust*, LEGAL TIMES, Nov. 27, 2006, at 50 (arguing that Congress, not the courts, is the appropriate vehicle to implement *Twombly*'s heightened pleading standards and tort reform in general).

²⁶² See, e.g., Brief of Respondents-Appellees at 19, *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007) (No. 05-1157), 2007 WL 621841.

²⁶³ See *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2399 (2007) (Thomas, J., dissenting). The majority contended that Justice Thomas' reading of the savings clause was incorrect since the same argument had been raised by the United States in an amicus brief in *Gordon*, and the Court rejected the argument. *Id.* at 2392 (majority opinion). Justice Thomas argued that the issue was not discussed in *Gordon* or *NASD* and that there was no indication that the omission was the product of "reasoned analysis" rather than "inadvertent oversight." *Id.* at 2400 (Thomas, J., dissenting).

²⁶⁴ 15 U.S.C. § 77p(a), 78bb(a) (2000).

²⁶⁵ See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983) (holding that the availability of an express remedy under the Securities Act did not preclude a plaintiff from maintaining an action under the Exchange Act).

²⁶⁶ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004). The Telecommunications Act has an antitrust-specific savings clause. Justice Thomas argues that the "mere existence of targeted saving clauses does not demonstrate . . . that antitrust remedies are not included within the 'any and all' . . . remedies" mentioned in the securities savings clauses. *Billing*, 127 S. Ct. at 2399 (Thomas, J., dissenting).

prior readings of saving clauses, the *Billing* Court dismissed Justice Thomas' objections all too quickly.

CONCLUSION

Billing signals a significant departure from well-established principles of antitrust immunity analysis. The Court's overly broad interpretation of "clear repugnancy" does not consider whether the activity is essential to permit federal securities laws to properly function, nor does it require immunity to be extended only to the minimum extent necessary. When both the SEC and antitrust laws disapprove of an activity, a clear repugnancy does not exist and the two laws may be reconciled. By substituting a costs-benefits analysis for the repugnancy standard, the Court has made the finding of implied immunity all too easy, in contradiction of prior cases that hold that grants of implied immunity should be rare. *Billing* is more properly understood as an extension of the Court's policy animus against private securities actions rather than a continuance of earlier antitrust immunity analysis. While the Court may have cogent arguments for limiting litigation, the altering of immunity analysis to further that goal represents an unprecedented block on a party's ability to get to court that will be felt far beyond the world of underwriters and IPOs.